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No. 03-

IN THE

Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

THOMAS FRANK CISCO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

RICK BRYANT
District Attorney
DAVID L. KIMBALL
Assistant District Attorney
F. WAYNE FREY
Assistant District Attorney
CARLA S. SIGLER*
Assistant District Attorney
1020 Ryan Street
Lake Charles, La 70602
(337) 437-3400

* *Counsel of Record*

Attorneys for Petitioner

185593

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Louisiana Supreme Court erred by ruling that respondent's counsel was burdened with an actual conflict of interest, in violation of the respondent's Sixth Amendment right to conflict-free counsel, where defense counsel and the trial court did not believe that there was a conflict, the record revealed no such conflict, and the respondent knowingly, intelligently, and voluntarily waived any potential conflict on three separate occasions?

2. Whether the Louisiana Supreme Court improperly reversed the respondent's murder convictions and death sentence and remanded the case to state district court for the appointment of new defense counsel and a retrial, not only because no actual conflict of interest existed, but also because it utterly failed to ascertain whether defense counsel's representation of the respondent was adversely affected, an inquiry which is mandated by this Honorable Court's decision in *Mickens v. Taylor*?

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The petitioner, the State of Louisiana, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Louisiana Supreme Court which reversed the defendant's triple homicide conviction and death sentence on Sixth Amendment grounds and remanded the case to the state district court for the appointment of new defense counsel and a retrial.

OPINION BELOW

On December 3, 2003, the Louisiana Supreme Court reversed the respondent's triple homicide conviction and death sentence, and remanded the case to the state district court for the appointment of new defense counsel and a retrial. The Louisiana Supreme Court, the highest state court of the State of Louisiana, ruled that the respondent's Sixth Amendment right to counsel had been violated because his attorney was burdened with an actual conflict of interest. The state appellate court utterly failed to conduct any inquiry into the adverse affect of this conflict on counsel's representation of the respondent. It further declined to remand the case for an evidentiary hearing on whether defense counsel was actually burdened with a conflict of interest, despite frequently noting in its opinion that based on the present record it was not certain of the nature of defense counsel's representation of a prosecution witness. The opinion rendered by the Louisiana Supreme Court and the denial of the State's request for a rehearing are attached as Appendices A and B. Petitioner herein seeks review of this judgment.

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. § 1257. This Court has the authority to review decisions of the highest state court when those rulings are based on the interpretation and application of federal constitutional law. The respondent claimed that his Sixth Amendment right to conflict-free counsel had been violated. The Louisiana Supreme Court reversed three murder convictions and a death sentence on Sixth Amendment conflict of interest grounds without a single reference to this Court's decision in *Mickens v. Taylor*, a decision which should not have been so blatantly disregarded, as it is undeniably controlling of the issues presented in this case. This Court should grant this certiorari petition and remedy the Louisiana Supreme Court's persistent refusal to consider this Court's rulings on Sixth Amendment conflict of interest issues so that no other convictions are unjustly reversed on federal constitutional grounds with neither consideration of nor reverence for this Court's federal constitutional jurisprudence.

STATEMENT OF THE CASE

On October 8, 1998, the respondent, Thomas F. Cisco, Jr., was indicted for committing the first degree murders of Marty LeBouef, Stacy Reeves, and Nicole Guidry. On October 9, 2000, the respondent's trial began. On October 17, 2000, he was found guilty as charged. On October 18, 2000, the jury unanimously found that the respondent should be sentenced to death.

The respondent appealed his convictions and sentence to the Louisiana Supreme Court. On December 3, 2003,

the Louisiana Supreme Court reversed the respondent's convictions and sentence and remanded his case for the appointment of new defense counsel and a retrial. On January 16, 2004, the Louisiana Supreme Court denied the State's request for a rehearing of its decision. (Appendix B).

The Louisiana Supreme Court's decision was predicated on the respondent's right to counsel under the Sixth Amendment of the United States Constitution. (Appendix A, pages 27a-28a). Specifically, the Louisiana Supreme Court ruled that the respondent's trial counsel labored under an actual conflict of interest. The Louisiana Supreme Court particularly discussed a purported violation of the respondent's Sixth Amendment right to conflict-free counsel, yet declined to address or even mention the leading and most recent decision of this Honorable Court regarding an attorney conflict of interest claim, *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237 (2002). The state appellate court's reliance on federal constitutional law to reverse a state court conviction, and concurrent failure to either address or apply the applicable jurisprudence of this Court in so doing, means that the petitioner's proper forum for redress is this Honorable Court.

The conflict of interest issue was initially brought to the state district court's attention by respondent's trial counsel, who did so out of an abundance of caution. (Appendix A, pages 12a-17a). Although neither respondent's defense counsel nor the trial court believed an actual conflict of interest existed, in an effort to protect the respondent's Sixth Amendment rights both his defense counsel and the trial court questioned the respondent about his desire to retain the services of his attorney, and had him waive any potential conflict issue on the record no fewer than three times.

The respondent raised as a claim of error conflicted counsel in his direct appeal to the Louisiana Supreme Court, and that court, while repeatedly noting the lack of pertinent information in the record, ruled that defense counsel labored under an actual conflict of interest. (Appendix A, pages 2a, 25a-27a). The state appellate court conducted no inquiry into the effect of any conflict on defense counsel's representation of the respondent, as required by this Court's decision in *Mickens v. Taylor*. (Appendix A). The Petitioner now seeks review of the Louisiana Supreme Court's judgment with this Honorable Court.

STATEMENT OF THE FACTS

The indictment of the respondent, Thomas Frank Cisco (hereinafter referred to as the "Respondent" and "Cisco"), arose out of the armed robbery of a convenience store in Lake Charles, Louisiana, on July 5, 1997. During the commission of the robbery two store employees, Marty LeBouef and Stacy Reeves, along with Ms. Reeves' fourteen-year-old babysitter, Nicole Guidry, were forced into the store's cooler and shot several times at point-blank range. All three died from their injuries.

The respondent was linked to these crimes. He was ultimately arrested and indicted for them, and he gave numerous confessions admitting his involvement in the murders. After he was indicted and arraigned on first degree murder charges Evelyn Oubre was appointed as his defense counsel, and she ably represented the respondent both in pre-trial proceedings and at trial. The respondent was ultimately convicted of three counts of first degree murder and sentenced to death.

At the time of her representation of the respondent, Ms. Oubre was enrolled as counsel for Deputy Donald "Lucky" Delouche in a family law matter. Deputy Delouche was the lead investigator for the triple homicide involving the respondent and was a prosecution witness at the respondent's trial. Ms. Oubre, knowing that no information she learned in her brief, perfunctory family law representation of Deputy Delouche could be used to assist the respondent at trial, did not believe that any conflict of interest existed by this concurrent representation. Nevertheless, out of an abundance of caution she informed the respondent and the trial court of this potential conflict of interest. All parties remained satisfied that no conflict of interest existed, and the respondent repeatedly asserted that he wanted Ms. Oubre to continue as his attorney.

REASONS FOR GRANTING THE PETITION

I. The Louisiana Supreme Court erred by ruling that respondent's counsel was burdened with an actual conflict of interest, in violation of the respondent's Sixth Amendment right to conflict-free counsel, where defense counsel and the trial court did not believe that there was a conflict, the record revealed no such conflict, and the respondent knowingly, intelligently, and voluntarily waived any potential conflict on three separate occasions.

A. Contrary to this Court's Sixth Amendment jurisprudence, the Louisiana Supreme Court improperly found that respondent's counsel was burdened by an actual conflict of interest.

The Louisiana Supreme Court erroneously ruled that respondent's counsel labored under an actual conflict of interest. (Appendix A, pages 24a-27a). An actual conflict exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client, and because of this compromise representation of the accused is affected. *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S. Ct. 1237, 1243 (2002). The record of these proceedings clearly reveals that under *Mickens v. Taylor* no Sixth Amendment violation occurred. This Court should grant this writ to correct the Louisiana Supreme Court's initial misinterpretation of and ultimate disregard for this Court's Sixth Amendment conflict of interest jurisprudence.

1. An actual conflict of interest would not have been found if the Louisiana Supreme Court had followed this Court's jurisprudence.

As this Court has previously noted, conflict of interest cases frequently entail a situation in which defense counsel, because of his or her joint representation of another, is influenced by that representation to the detriment of the accused. Joint representation of two criminal defendants in the same proceeding is the classic conflict situation addressed by this Court in *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173 (1978). In this case, defense counsel represented the respondent in a criminal matter and a prosecution witness in a family law matter. Thus, this case is certainly not one of an overt and obvious conflict of interest.

Ms. Oubre represented Deputy Delouche's interests in a family law matter, and her role to protect his interests in a smooth and untroubled resolution of his marriage and of child custody (as much as that is possible) differed greatly from her protection of the respondent's interest in receiving a fair trial. There simply were no competing interests at stake here, as Deputy Delouche had no personal stake in the respondent's conviction, and he was a witness whose testimony could be independently verified by other sources. Moreover, he had no personal interest in seeing the respondent convicted, but only in ensuring that justice was served. Likewise, the respondent's interest in a fair trial can hardly be said to have been in competition with Deputy Delouche's family law interests. The two subject matters of representation were *entirely* unrelated, thus they cannot possibly have been in such opposition as to produce a conflict of interest. To assume a conflict of interest existed in this case is to determine that Deputy Delouche had a personal interest in the respondent's

conviction and was his sole accuser. Such an assumption is wholly unwarranted, as this respondent was tried and convicted on the basis of *many* witnesses' testimony in a prosecution brought by the *State of Louisiana*, not Deputy Delouche.

The *Holloway* Court stated that the real problem inherent in the joint representation of conflicting interests, and the reason it is suspect, is because of what it prevents the attorney from doing, or what he or she feels compelled to refrain from doing. *Holloway*, 435 U.S. at 489-490, 98 S. Ct. at 1181-1182. In this case, there were no conflicting interests at stake, not only because of the two unrelated subject matters of representation and different interests associated therewith, but also because defense counsel could not possibly have used any information she obtained during her family law representation of Deputy Delouche to assist the respondent at trial. Thus, she had no need to even determine whether or not to refrain from doing anything. Furthermore, Ms. Oubre certainly had no difficulty questioning Deputy Delouche on the respondent's behalf at trial, despite her representation of him in the family law case, as she cross-examined him for some *eighty-three* pages of the trial transcript. (R. Volumes 25-26, pp. 3712-3795). Such zealous advocacy hardly reveals any trepidation or hesitation on Ms. Oubre's part.

In determining that an actual conflict of interest existed in this case, the Louisiana Supreme Court stated that such a conflict arose by the mere fact that defense counsel was required to cross-examine Deputy Delouche. (Appendix A at page 24a, citing *State v. Carmouche*, 508 So. 2d 792, 804 (La. 1987); *State v. Franklin*, 400 So.2d 616, 620 (La. 1981)). Such a finding disregards the essence of a conflict of interest

claim, which is nothing more than a hybrid Sixth Amendment ineffective assistance of counsel claim. *See Holloway v. Arkansas*, 435 U.S. 475,481, 98 S. Ct. 1173, 1177 (La. 1978), citing *Glasser v. United States*, 315 U.S. 60 (1942). To find a conflict of interest with no showing of adverse affect, and in the absence of even the *possibility* that information obtained during representation of one client could or should have been used to benefit another, does nothing to protect a defendant's Sixth Amendment rights.

In *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237 (2002), this Court stressed that an actual conflict *cannot* be found without adverse effect on defense representation. The *Mickens* Court stated:

> . . . an "actual conflict of interest" meant precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties. It was shorthand for the statement in *Sullivan* that "a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief." *446 U.S. at 349-350.*[1] (emphasis in original).

Mickens, 535 U.S. at 171, 122 S. Ct. at 1243-1244. The Court again noted that the term "actual conflict of interest" necessitated an inquiry into counsel's performance when it stated: ". . . [w]e have used 'conflict of interest' to mean a division of loyalties *that affected counsel's performance.*" (emphasis in original). *Mickens*, 535 U.S. at 172, 122 S. Ct. at 1244, footnote 5. Not only did the Louisiana Supreme

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1. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980).

Court forego any inquiry into adverse affect, thus blatantly ignoring this Court's Sixth Amendment conflict jurisprudence despite basing its decision on a purported violation of the respondent's Sixth Amendment rights, but it detailed an artificial and unwarranted presumption of actual conflict which this Court has never espoused, and in fact specifically rejected by its holding in *Mickens*.

The Louisiana Supreme Court presumptively opined that a "defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict." (Appendix A at page 24a, citing *State v. Carmouche*, 508 So.2d 792, 804 (La. 1987); *State v. Franklin*, 400 So.2d 616, 620 (La. 1981)). The Louisiana Supreme Court's determination of an actual conflict in such cases, with neither regard to nor consideration of the effect on counsel's representation, is in direct contradiction to this Court's holding in *Mickens*. It creates an artificial and automatic finding of actual conflict without regard to: (1) the nature of the prior or current representation of the clients; (2) a determination of whether that representation actually involves competing interests; and (3) a finding that counsel's representation is adversely affected by conflicting loyalties to clients. The Louisiana Supreme Court's persistent refusal to acknowledge this Court's latest ruling on attorney conflict of interest—*Mickens*—*and* its stubborn resistance to proper Sixth Amendment analysis of conflict of interest claims—should be remedied by this Honorable Court.

2. The Louisiana Supreme Court repeatedly stated that it lacked sufficient information to determine whether a conflict of interest actually existed, but refused to remand the case for an evidentiary hearing to further explore this issue.

Perhaps even more egregious than the Louisiana Supreme Court's assumption that an actual conflict of interest existed is its outright refusal to remand the case for further exploration of the nature of Ms. Oubre's representation of Deputy Delouche, despite repeatedly noting in its decision that there were many facts about this representation that the court just did not know. (Appendix A). The court noted that information in the record was insufficient to determine the precise nature of defense counsel Oubre's representation of Mr. Delouche on many occasions. Indeed, it reversed the jury's verdict and remanded the case for a new trial with the following words: "In the instant case, we find that a similar result [reversal] is mandated, *primarily because the record is silent* as to the particulars of defense counsel's representation of Deputy Delouche and his wife." (Appendix A, pages 25a-26a) (emphasis added). Where the record is silent on an issue so critical that a court believes that it could or should mandate the reversal of three capital murder convictions, the solution to this problem is obvious: remand for an evidentiary hearing. This solution is certainly preferable to outright reversal of these convictions on the basis of a "silent" record.

The above-quoted passage is far from the only time the Louisiana Supreme Court noted the record's lack of information on the conflict issue. The court first referred to the nature of Ms. Oubre's representation of witness Lucky

Delouche and his wife in what are "alternatively described as family law matters." (Appendix A, page 1a). The court again noted the undetermined nature of Ms. Oubre's representation of Mr. Delouche when it stated:

> "... consequently, Oubre, *as far as the record reveals, may have represented* both the defendant and the State's primary prosecution witness from the time of the defendant's arrest, throughout the trial, and until his conviction on three counts of first degree murder and sentence to death. Therefore, this is a case in which an attorney *appears to have simultaneously represented* both the accused and his accuser, and the issue presented is whether the accused's waiver of his Sixth Amendment right to conflict-free counsel was knowing and intelligent." (Appendix A, page 2) (emphasis added). The court continued: "The particulars of Oubre's representation of Deputy Delouche and his wife are *not known*." (*Id.*) (emphasis added).[2]

The State submits that it is unconscionable for a court to reverse three *capital murder convictions*—or indeed *any* conviction—on the basis of information it admittedly does not know. Judicial efficiency and the principles of justice require that this Honorable Court reverse the decision of the Louisiana Supreme Court, or at the very least remand this case for an evidentiary hearing in which the "particulars"

2. The Louisiana Supreme Court noted the lack of record information regarding Ms. Oubre's representation of Deputy Delouche on several other occasions. (Appendix A, pages 1a-2a, 25a-26a). Indeed, this "lack of sufficient information" refrain appears numerous times throughout the court's opinion. (Appendix A).

of Ms. Oubre's representation of Deputy Delouche are made known. Unless and until that hearing occurs and that record is made, the Louisiana Supreme Court has reversed three capital murder convictions not only contrary to this Court's conflict jurisprudence, but on the basis of inconclusive information.

As this Court knows, this case is a capital one involving a tremendous amount of time and resources. The cost to the victims' families, counsel for the State and defense, and the taxpaying citizens of Louisiana requires that an informed decision be reached before the high price of reversal is paid. The decision of the Louisiana Supreme Court has far-reaching implications, as it creates an artificial and improper standard for Sixth Amendment conflict of interest review which completely ignores the jurisprudence of this Court. Moreover, it should not be predicated on a record which the state appellate court repeatedly noted is deficient of important factual information. It costs nothing to remand this case for an evidentiary hearing to determine if the court's decision on the conflict issue was factually and legally correct, while the cost of allowing such a serious decision to rest on undetermined facts and questionable information is considerable.

B. The Louisiana Supreme Court erred in failing to recognize that a defense attorney is in the best position to determine when a conflict of interest may and has developed, and by its refusal to recognize the defendant's knowing, voluntary, and intelligent waiver of any potential conflict of interest.

The greatest irony behind the Louisiana Supreme Court's reversal of the respondent's convictions and sentence is the fact that both the trial court and defense counsel believed no actual conflict of interest existed, and in fact addressed the issue only out of an abundance of caution and a fierce sense of protection for the respondent's Sixth Amendment rights. As detailed by the State *infra*, there *was* no actual conflict of interest in this case. Despite this fact, the Louisiana Supreme Court's decision basically penalizes the trial court and defense counsel for being vigilantly protective of the respondent's Sixth Amendment rights through their discussion of even the remote potential for a conflict of interest to arise.

In *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173 (1978), this Court noted that an attorney is in the best position to determine whether a conflict of interest exists or is likely to develop during the trial. *Holloway*, 435 U.S. at 485, 98 S. Ct. at 1179. Upon realizing that a conflict exists defense counsel has the obligation to notify the court of the conflict. *Holloway*, 435 U.S. at 486, 98 S. Ct. at 1179. After such notification, the trial judge must use his discretion to ensure that the trial is conducted with reverence for the essential rights of the accused. *Holloway*, 435 U.S. at 484, 98 S. Ct. at 1179; *see also Wheat v. United States*, 486 U.S. 153, 163, 108 S. Ct. 1692, 1699 (1988).

While the attorney in *Holloway* believed that he could not provide effective assistance of counsel to his client, in the present case Ms. Oubre did not believe that her representation of the respondent in his criminal case and Deputy Delouche in an unrelated matter would compromise the respondent's right to effective assistance of counsel. *Holloway*, 435 U.S. at 477, 98 S. Ct. at 1175. (Supp. R. lodged on 10/07/03, pp. 16-23; *see also* Appendix to Respondent's direct appeal brief, pp. 177-78). The Louisiana Supreme Court falsely assumes that because Ms. Oubre brought her dual representation to the attention of the trial court and the respondent that she felt concerned about this representation. (Appendix A at page 26a). In fact, contrary to the Louisiana Supreme Court's opinion, Ms. Oubre's notice to the respondent and the trial court of her representation of Deputy Delouche demonstrates that she was acting in professional good faith. (Supp. R. lodged on 10/07/03, p. 18). Ms. Oubre was conducting business according to applicable professional standards, as well as the precedent set forth by this Court. *Holloway*, 435 U.S. at 485-486, 98 S. Ct. at 1179-1180.

The Louisiana Supreme Court was also concerned with the manner in which Ms. Oubre notified the respondent of her previous representation of Deputy Delouche. (Appendix A at page 26a). The court further advanced an unfounded skepticism regarding Ms. Oubre's attainment of a written conflict waiver from the respondent prior to a court appearance. (*Id.*). Stating that counsel made an unsupported assertion that she was not laboring under a conflict of interest and inferring that her advance notice to the respondent suggests that she *was* acting under a conflict, the Louisiana Supreme Court opined that the actions of Ms. Oubre and the trial court denied the respondent of his Sixth Amendment right to conflict-free counsel. (*Id.*). This opinion of the

Louisiana Supreme Court is factually and legally unfounded, not only because the respective interests of Deputy Delouche and the respondent were never adverse, but also because the record reveals that Ms. Oubre's representation of the respondent was exemplary.

In addition to the Louisiana Supreme Court's erroneous finding of an actual conflict of interest, the court also refused to recognize the judicial effect of the respondent's knowledgeable and intelligent waiver upon his Sixth Amendment right to conflict-free counsel. (Appendix A at page 30a). In *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938), this Court noted that a constitutional right (such as the Sixth Amendment right to conflict-free counsel) may be waived by a defendant. The *Johnson* Court noted that a waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464, 58 S. Ct. at 1023. The Court stated that the determination of an intelligent waiver of a right includes a consideration of the particular facts and circumstances of the case, including the accused's "background, experience, and conduct." *Id.*

In this case, the respondent, who was fully informed of the nature of the potential conflict by defense counsel and two trial judges, waived his right to complain of the conflict on three separate occasions. (Supp. R. lodged on 10/07/03, pp. 16-23). First, the respondent signed a letter given to him by Ms. Oubre, informing him of the nature of the potential conflict. (See Appendix to Respondent's direct appeal brief, p. 177). Then, after further discussing the matter with her, he informed Ms. Oubre before a hearing that he still wished for her to represent him. The respondent then told a trial judge of that same desire *after* a complete discussion with the judge of the nature of the potential conflict and possible

circumstances under which it could arise. (Supp. R. lodged on 10/07/03, pp. 16-23). Once more, he informed *yet another* trial judge of his continued desire for Ms. Oubre to remain as his counsel, even after being questioned by that court about the subject. (Supp. R. lodged on 10/08/01, pp. 4-5).

On September 24, 1998, a hearing on the conflict issue was held. The respondent unequivocally chose to retain Ms. Oubre as counsel. At the hearing the trial judge discussed the potential conflict with the respondent. The judge questioned the respondent about the waiver document he had signed, as well as his signature on and understanding of the document. In response to the trial court's questions, the respondent indicated that he read, understood, and signed the waiver form. The trial judge then went on to explain the ways in which a potential conflict could arise from Ms. Oubre's representation of the defendant and Deputy Delouche. The respondent indicated that he understood the nature of the potential conflict, and still wanted Ms. Oubre to represent him.

The following colloquy occurred when the Honorable Fred Godwin discussed the conflict issue with the respondent:

> Q: . . . And I can't sit here and forecast all the different little ways that something may come up there, but that's what we're talking about, is something like that. This letter that's written here uses the term conflict and everything, and I'm trying to flesh it out for you, for you to picture—so, do you see all of that?
>
> A: Yes, sir, I understand.

Q: And you're comfortable with that?

A: Yes, sir.

Q: And you want Ms. Oubre to continue representing you?

A: Yes, I do.

Q: And you're—you then are waiving any complaint or problem that you would otherwise have about conflict because she's representing you, but happens to also—long before she ever was appointed to represent you—represented Mr. Delouche in a personal matter.

A: Yes, I am.

Q: And that's not a problem for you?

A: No.

The trial court then went on to question the respondent about his education and work history, in yet another effort to determine whether he understood the issue, before commenting that the respondent seemed fully capable of understanding the question at hand.

At a hearing held on November 8, 1999, another trial judge, the Honorable Patricia H. Minaldi, further discussed the conflict issue with the respondent. Ms. Oubre informed the trial court that she wanted the respondent to be questioned under oath about her contined representation of him.

The trial judge indicated that she had previously questioned the respondent about his desire to retain Ms. Oubre as counsel, and he had assured her that he wished for Ms. Oubre to continue to represent him. Judge Minaldi subsequently questioned the respondent, and he indicated that he had no doubts about Ms. Oubre continuing to represent him, and further wanted her to do so.

Consider the number of times and the manner in which the respondent knowingly waived his right to complain of the potential conflict of interest:

> (1) By signing a letter given to him by Ms. Oubre which informed him of the nature of the potential conflict, thus indicating he wished her to remain as his counsel (Appendix to Respondent's direct appeal brief, p. 177);
>
> (2) By again informing Ms. Oubre before a hearing that he still wished for her to represent him, after discussing the matter with her, and by informing a trial judge of that same desire after a complete discussion with the judge of the nature of the potential conflict and possible circumstances under which it could arise (Supp. R. lodged on 10/7/03, pp. 16-23);
>
> (3) By once more informing *another* trial judge of his desire for Ms. Oubre to remain as his counsel, after being questioned by that court about the subject (Supp. R. lodged on 10/8/01, pp. 4-5).

The Louisiana Supreme Court clearly erred in determining no valid waiver of the conflict of interest occurred. Not only

did no actual conflict of interest ever arise, but the record reveals that defense counsel and the trial court were amply protective of the respondent's Sixth Amendment rights. Furthermore, the respondent repeatedly waived any potential conflict and continually expressed his desire to retain Ms. Oubre as defense counsel.

II. The Louisiana Supreme Court improperly reversed the respondent's murder convictions and death sentence and remanded the case to state district court for the appointment of new defense counsel and a retrial, not only because no actual conflict of interest existed, but also because it utterly failed to ascertain whether defense counsel's representation of the respondent was adversely affected, an inquiry which is mandated by this Honorable Court's decision in *Mickens v. Taylor*.

In its most troublesome error, the Louisiana Supreme Court failed to follow the precedent set by this Honorable Court when it determined that respondent's counsel labored under an actual conflict of interest. In *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S. Ct. 1237, 1243 (2002), this Court held that a reviewing court faced with a conflict of interest question *must* inquire as to whether or not an actual conflict of interest adversely affected the adequacy of counsel's representation. In *Mickens* the Court discussed its previous conflict jurisprudence and explained that "'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance* – as opposed to a mere theoretical division of loyalties." *Mickens,* 535 U.S. at 171, 122 S. Ct. at 1243, citing *Cuyler v. Sullivan*, 446 U.S. 335, 349-350, 100 S. Ct. 1708 (1980). The Louisiana Supreme Court ruled that an actual conflict of interest deprived the respondent of his

Sixth Amendment right to conflict-free counsel, yet spoke *not one word* about its effect on defense counsel's representation of the respondent. (Appendix A).

No adverse affect on defense counsel's representation of the respondent can be demonstrated. Indeed, the record reveals that Ms. Oubre was an impassioned advocate for the respondent. Her representation of him was exemplary, and her cross-examination of all witnesses, *including* her client, Deputy Delouche, was strategically sound and incredibly thorough. Without evidence of an adverse affect on counsel's representation of the respondent, under *Mickens* no actual conflict of interest can be said to exist. In this case, evidence of any adverse affect on counsel's representation of the respondent is conspicuously absent.

By completely foregoing *any* inquiry into counsel's representation of the respondent, the Louisiana Supreme Court has thwarted the very purpose of the Sixth Amendment conflict of interest protection afforded to criminal defendants. As this Court noted in *Mickens*, "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens,* 533 U.S. at 166, 122 S. Ct. at 1240, citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052 (1984).[3] The Louisiana Supreme Court improperly

3. The Supreme Court has created an exception to this general rule requiring a requisite showing of counsel's probable effect upon the trial's outcome by "presum[ing] such an effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens*, 533 U.S. at 166, 122 S. Ct. at 1240-1241. This exception does not apply to this case.

reversed a triple homicide conviction and death sentence on Sixth Amendment grounds where no conflict of interest nor deficient assistance of counsel existed, all while utterly ignoring the binding precedent of this Court. Justice dictates that this reprehensible error be remedied by this Honorable Court.

CONCLUSION

The Louisiana Supreme Court erred in its reversal of the respondent's convictions and death sentence and remand of the case to state district court for the appointment of new defense counsel and a retrial. Although the state appellate court based its decision on a purported violation of the respondent's Sixth Amendment right to conflict-free counsel, it completely ignored the controlling precedent set forth by this Court. To reverse three homicide convictions and a death sentence on Sixth Amendment grounds without heeding the mandates of this Court is a blatant miscarriage of justice which must be remedied. Without such correction, the Louisiana Supreme Court will continue to destroy the sanctity of criminal convictions on federal constitutional grounds with absolutely no regard for this Court's jurisprudence on federal constitutional issues.

The state appellate court erroneously found that Ms. Oubre was burdened with an actual conflict of interest during her representation of the respondent. Despite deciding to reverse the respondent's convictions on Sixth Amendment grounds, the state appellate court did not follow this Court's precedents when it completely failed to inquire into whether the purported conflict of interest adversely affected Ms. Oubre's representation of the respondent. Without such

an inquiry, the Louisiana Supreme Court not only failed to truly determine whether an actual conflict of interest existed, but it also failed to assess whether the respondent actually received ineffective assistance of counsel, a question which is the fundamental essence of any conflict of interest claim.

Not only does the record reveal that no actual conflict of interest existed, but it further exhibits the exemplary defense this respondent received. This defense can by no means be considered ineffective, much less as suffering from even the slightest adverse effect. The Louisiana Supreme Court committed an egregious error in reversing this respondent's convictions and sentence, and ruled in flagrant violation of this Court's jurisprudence in so doing. Therefore, the State of Louisiana respectfully requests that this Honorable Court grant its certiorari petition and re-instate the respondent's convictions and sentence, or in the alternative remand this case for an evidentiary hearing.

Respectfully submitted,

RICK BRYANT
District Attorney
DAVID L. KIMBALL
Assistant District Attorney
F. WAYNE FREY
Assistant District Attorney
CARLA S. SIGLER*
Assistant District Attorney
1020 Ryan Street
Lake Charles, La 70602
(337) 437-3400

* *Counsel of Record* *Attorneys for Petitioner*

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF LOUISIANA DATED DECEMBER 3, 2003

SUPREME COURT OF LOUISIANA

No. 2001-KA-2732

STATE OF LOUISIANA

v.

THOMAS F. CISCO

ON APPEAL FROM THE FOURTEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF CALCASIEU HONORABLE PATRICIA MINALDI, JUDGE

CALOGERO, Chief Justice.

The defendant has been convicted of three counts of first degree murder and sentenced to death by lethal injection. Because we conclude on direct appeal that the defendant did not knowingly and intelligently waive his right to conflict-free representation by appointed counsel, we reverse the convictions and sentence.

FACTS

Lake Charles attorney Evelyn M. Oubre represented Calcasieu Parish Deputy Sheriff Donald "Lucky" DeLouche and his wife in separate domestic matters, alternatively described as family law matters. Throughout the relevant time period of this case, Deputy DeLouche was the Director of the Violent Crimes Task Force (VCTF), an elite homicide investigation unit made up of law enforcement officers from

the Calcasieu Parish Sheriff's Office, the Louisiana State Police, and area police departments.[1] Deputy DeLouche was the lead investigator for the July 6, 1997 killings of three people during an apparent armed robbery of KK's Corner, a convenience store located in Calcasieu Parish. DeLouche's investigation led to the arrest of Thomas Frank Cisco more than one year after the killings. Attorney Oubre was appointed to represent Cisco, who was later indicted for these killings; consequently, Oubre, as far as the record reveals, may have represented both the defendant and the State's primary prosecution witness from the time of the defendant's arrest, throughout trial, and until his conviction on three counts of first degree murder and his sentence to death. Therefore, this is a case in which an attorney appears to have simultaneously represented both the accused and his accuser, and the issue presented is whether the accused's waiver of his Sixth Amendment right to conflict-free counsel was knowing and intelligent.[2]

The particulars of Oubre's representation of Deputy DeLouche and his wife are not known.[3] Oubre described the DeLouches' cases only as family law matters without

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1. The VCTF was disbanded in July of 2000 following the election of a new sheriff in Calcasieu Parish.

2. Because we reverse the defendant's convictions and sentence of death on this ground, we pretermit discussion of the defendant's other assignments of error.

3. Oubre also represented another sheriff's deputy member of the investigation team, Vic Salvador, though he did not testify at trial against the defendant.

apparently providing the court or the defendant with additional information. Nor did Oubre state whether her representation of DeLouche and his wife was ongoing, although DeLouche himself, in a deposition in a civil suit against the sheriff's office arising out of the killings, indicated that Oubre was his personal counsel well after she had been appointed to represent the defendant.[4] While Oubre did not disclose to the district court any of the particulars regarding her representation of the DeLouches, a member of the local defense bar, Thomas Lorenzi, was sufficiently alarmed about Oubre's dual representation of the defendant and the lead investigator that he wrote a letter, dated October 9, 1998, to the district court outlining his concerns. This attorney stated to the district court that Deputy DeLouche's domestic file in the district court had been placed under seal, thus Oubre could not have fully explained potential conflicts to the defendant unless she had obtained an order either unsealing the record or relieving her from the obligation not to disclose. This attorney further stated that information known to the defense bar was that the pleadings in DeLouche's domestic case were placed under seal because there had been allegations of criminality made against him. The record does not indicate that this letter or its contents were ever disclosed to the defendant. Moreover, though Oubre and the district court were surely aware of the letter,[5] Oubre did not respond

4. Ellis LeBouef, the father of victim Marty LeBouef, had sued the Calcasieu Parish Sheriff's Office and the owner of the convenience store, among others, for their failure to respond appropriately to the security company's notification that the alarm at the store had not been set after closing time.

5. Prior to allotment of the case to Judge Minaldi, Judge Godwin presided over the hearing of September 24, 1998, at which the issue (Cont'd)

to the letter's contents on the record, and the district court never inquired of Oubre or anyone else as to the contents of the letter.[6]

Nonetheless, the record does reveal the depth and extent of Deputy DeLouche's involvement in the case against the defendant. DeLouche and the Task Force to this day believe that more than one person committed the murders at KK's Corner in Calcasieu Parish, but only the defendant has ever been arrested for the offense. Because there was no physical evidence linking the defendant or anyone else to the crime scene, the State's case, alleging that the defendant was either the shooter or at least a principal to the murders, rested on the defendant's multiple statements, some nineteen of which were introduced at trial and which contained numerous and contradictory assertions at odds with key facts known to the Task Force. The majority of these statements, and certainly

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(Cont'd)
of counsel's conflict of interest was first raised. According to Lorenzi's affidavit of December 19, 2002, Judge Godwin assured him that he had forwarded the letter to Judge Minaldi.

6. We must point out, however, that no criminal charges have ever been filed against Deputy DeLouche with regard to the domestic matters in which Oubre represented him, but the fact remains that the instant record is deficient as to the particulars of Oubre's representation of DeLouche and his wife. For example, it is not known whether Deputy DeLouche was ever the subject of a criminal investigation by either the Sheriff's Office or some other law enforcement agency at the same time Oubre may have examined him on the defendant's behalf. If Oubre and DeLouche possessed such information, neither the defendant nor the trial court were similarly informed.

the most damning of them, were secured by Deputy DeLouche alone or at his direction, all while Oubre apparently represented both DeLouche and the defendant. Although the defendant identified other people in some of his inculpatory statements as co-perpetrators, as DeLouche himself explained to the district attorney at trial, no one else has ever been arrested because the defendant's "word alone—as you see, he's changed the statement so many times, I wouldn't feel comfortable arresting anybody without some corroborating evidence other than his own word."

The State's case against the defendant also rested on the testimony of Virginia Johnson, who unexpectedly identified the defendant in a physical line-up conducted by Deputy DeLouche in defense counsel's absence on the day she was first appointed, and thereby placed the defendant on the scene. Johnson had never before been able to give a detailed description of the second of two men she had seen entering the convenience store where the murders later occurred, but she nonetheless identified the defendant as that man at the line-up conducted by Deputy DeLouche. She also recalled, for the first time, that the second man had a tattoo on his left hand, when she saw tattoos on both of the defendant's hands at the line-up.

The defense theory of the case was that the defendant had given these false confessions because he lacked a mature and established self-identity, and, therefore, he was easily influenced by persons in authority and, chameleon-like, would say anything in an effort to please whomever he was with. The defendant's mental disorder, according to defense experts who testified in the guilt-innocence phase of trial, arose out of his turbulent upbringing and his long-term

substance abuse, beginning when he was six years old. The defense also extensively challenged the reliability of Ms. Johnson's identification, pointing out the various inconsistencies in her statements to police, one of which was conducted under hypnosis.

With that preface in mind, we turn to the facts of this rather complex case, particularly as they relate to DeLouche's involvement in the investigation of these murders and defense counsel's efforts to obtain a waiver from the defendant regarding her apparently simultaneous representation of him and DeLouche.[7]

In the early morning hours of July 6, 1997, three people, Stacie Reeves, Marty Lebouef, and 14-year-old Nicole Guidry, were killed during the apparent armed robbery of KK's Corner, a convenience store and gas station located near the corner of Tom Hebert Road and Highway 14 in Calcasieu Parish. The victims, whose bodies were found in the store's cooler, were each shot multiple times, and the killers had taken particular and specific measures so as to leave no physical identification evidence at the scene, including the cutting of telephone lines and the removal of a surveillance video-tape from the store's locked office. Consequently, the tragic crime went notoriously unsolved for over a year, and the efforts of DeLouche's Task Force to

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7. For the sake of not overburdening the reader with protracted discussions of the substance of the defendant's numerous and lengthy interviews and statements, including the many contradictions, inconsistencies, and errors therein, the facts related below focus on DeLouche's involvement in obtaining many of the statements and the defendant's purported waivers of his right to conflict-free counsel.

find the murderers were extensive and well-publicized, with hundreds of people interviewed, the Federal Bureau of Investigation called in to assist, and substantial rewards offered by Crimestoppers ($10,000.00) and then Calcasieu Parish Sheriff Wayne McElveen (up to $100,000.00). As set forth previously, Deputy DeLouche was the lead investigator for the VCTF and an indispensable witness for the State at trial. Nearly one year after the crime was committed, Deputy DeLouche and the VCTF began to investigate Thomas Frank Cisco, who had been a friend of one of the victims.[8] During the questioning the defendant by

8. Shortly after the crime, Violent Crime Task Force investigators learned that Virginia Johnson had purchased gas just before midnight on the night of the killings. Investigators interviewed her and determined that two men she had seen entering KK's Corner were most likely involved in the killings. Johnson helped police produce a composite sketch of the first man she saw walk into KK's Corner, but she could not give much of a description of the second man, remembering only that he had had a Marlboro key chain hanging from a front pocket. Johnson was later placed under hypnosis, and also recalled a rabbit's head key chain in the second man's front pocket, but she still gave only a superficial description of the second man, insufficient for a composite sketch. A week or so after this session, she helped produce a second composite drawing of the first man.

On January 24, 1998, the television show America's Most Wanted aired a segment about the "killings at KK's Corner," depicting the events of the crime, including the detail that one of the perpetrators wore a rabbit's foot key chain in a front pocket. That evening, Lake Charles resident Lonnie Kemp contacted VCTF investigators and told them that she knew of a white male from Lake Charles who had known Stacie Reeves and wore a rabbit's foot in his front pocket. Kemp told police that she thought the man lived in New Orleans. (Cont'd)

Appendix A

FBI agents in May of 1998, the defendant, though generally denying involvement, made some suspicious claims or statements.[9] More than three months later, FBI agents re-interviewed the defendant, informing him that his claim of having been in Metairie the entire 4th of July weekend in 1997 could not be verified.[10] After five and half hours during which the defendant gave four different, diverging statements about the crime, ranging from no involvement to pointing the finger at a Robert Thigpen as the shooter, the defendant made a written statement implicating himself and Thigpen in the crime.[11] The defendant, who had admitted to having

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Acting on the tip from Kemp, FBI agents eventually tracked down the defendant in Metairie, and interviewed him on May 12 and 13, 1998.

9. During the first interview on May 12th, the defendant mentioned that he was a friend of Reeves, and claimed that he had not heard from her since he moved from Lake Charles in 1989. He also admitted that around the time that the killings took place, he had been a heavy drug user, and that while he was on drugs he had violent tendencies. He stated that it was possible that he had participated in the killings, but had no memory of it because of drug use. On the second day of interviews, the defendant claimed that he was in Metairie for the entire 4th of July weekend in 1997, and denied any participation in the killings.

10. A neighbor in the defendant's former apartment complex testified at trial that she told the defendant he could not accompany her and some friends when they left a barbecue at the complex around 7:00 p.m. on July 4, 1997, a Friday. The neighbor said she next saw the defendant on the following Monday or Tuesday.

11. The interview began shortly after 12:00 noon, and the written statement commenced around 5:30 p.m., concluding around 8:30 p.m.

seen the America's Most Wanted broadcast on the murders and was occasionally emotional, gave conflicting, and at times false, details about his participation in the crime. Though he was warned that he would be placed under arrest in Lake Charles, the defendant agreed to be transported by FBI plane to Deputy DeLouche and the Task Force in Lake Charles.

Deputy DeLouche and members of his team met the defendant around 11:00 p.m. on August 26, 1998, at which time DeLouche and the defendant, who had known each other in the past, caught up on what they had been doing since. The defendant then directed DeLouche to places he had supposedly visited the weekend of the crime, pointing out the bus station at which he had arrived in Lake Charles from New Orleans and attempting to locate the home of Robert Thigpen, where they had allegedly planned the robbery. However, the bus station the defendant directed them to had not been in operation in July of 1997, and the defendant was never able to identify Thigpen's home even when DeLouche took him to that particular street. When these errors were pointed out to the defendant, DeLouche, questioning the defendant himself, secured yet another inculpatory statement from the defendant, which lasted until 2:30 or 2:45 in the morning and which still fingered Thigpen as the shooter. Thereafter, the defendant was placed under arrest for armed robbery and taken to the DeQuincy jail.

The next day, DeLouche and his team located Thigpen, whose wife and her sister had taken victim Nicole Guidry to KK's Corner the evening of the crime to leave her with Stacie Reeves. Thigpen, whose appearance, according to DeLouche,

did not fit Johnson's description of the first man she had seen at the store, provided an alibi that DeLouche deemed firm. That day, in a series of interviews, DeLouche's team accused the defendant of either minimizing his involvement in the crime, covering for someone else, or making the whole thing up because of his feelings of inadequacy. The defendant then asked to speak to DeLouche alone in order to tell the truth, but when the defendant denied any involvement in the killings, DeLouche told the defendant he was not "man enough" and did not have "the guts" to admit his involvement. The defendant ultimately claimed this time that he had done the crimes by himself.

However, at this point, the defendant began indicating that he might need an attorney. After consulting with the district attorney, DeLouche returned to the defendant to clarify the invocation of counsel, but DeLouche nonetheless obtained the defendant's agreement to take DeLouche to the hotel where the defendant had stayed while in Lake Charles in September of 1996 doing work for his then employer.[12] Thereafter, arrest warrants were prepared, and the defendant was taken to the Calcasieu Parish jail, where he was apparently placed in isolation.[13]

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12. At trial, Robert Thigpen's sister, Sheila, testified that she was friends with Stacie Reeves and that she had seen the defendant with Reeves on two occasions inside KK's Corner during September of 1996.

13. The defendant was kept in isolation for much of 1998 and 1999. At some point in the Spring of 1999, the defendant while in the general population accessed a telephone and called a local television station to make claims about the case and the involvement in the crime of the son of the then Calcasieu Parish Sheriff.

Appendix A

On August 30, 1998, the defendant asked to talk to DeLouche, who declined until the following day, August 31st. In the defendant's cell, DeLouche agreed to help the defendant obtain medication and perhaps be returned to the general population and be allowed to smoke cigarettes. During this conversation, the defendant again admitted involvement in the robbery and murders. DeLouche then asked the defendant about the gun and the missing videotape and whether the defendant would accompany him to the New Orleans area to show where the defendant had disposed of these items. However, later that day, the defendant again asked to speak with DeLouche, who sent other Task Force members to question the defendant, at which time the defendant recanted his previous inculpatory statements. Once again, the district attorney was consulted, and DeLouche was instructed to obtain another statement, which he did, resulting in another video-taped inculpatory statement.

On September 1, 1998, the court appointed attorney Oubre to represent the defendant; however, Oubre stated she was then on vacation and did not return to her office until a week later. Nonetheless, on September 1, 1998, when she was informed of the appointment, counsel left a message with the district attorney requesting that the line-up requested by DeLouche be postponed until she could be present. DeLouche, meanwhile, had already obtained the defendant's permission to proceed without Oubre's presence. As DeLouche told the jury at trial, he conducted a physical line-up on September 1, 1998, at which Virginia Johnson unexpectedly identified the defendant as the man who had bumped into her at the convenience store. DeLouche related to the jury how Johnson was surprised that she could identify

the defendant but that she was certain it was he. Johnson at trial described how she came to make the identification of the defendant at this line-up.

Defense counsel Oubre indicated that she first spoke to the defendant on September 14, 1998. Two days later, on September 16, 1998, having immediately recognized at least the potential for conflicting interests caused by her dual representation of the defendant and Deputy DeLouche, counsel sent the defendant a letter in which she vouched to the defendant that she did not have a conflict because of her representation but nevertheless left it up to the defendant to determine if she did and whether he wanted to continue with her representing him.[14]

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14. That letter provided as follows:

> As you are aware, I have been appointed as lead counsel in your criminal matter. Before we discuss any facts concerning your case, I want you to be aware that I am the attorney for the lead investigator for the Violent Crimes Task Force, Mr. Lucky DeLouche. I represent Mr. DeLouche in a family law matter. I also represent Mr. DeLouche's wife in a separate family law matter. If *you* believe that there is a conflict in interest [sic] in my representing you in your proceedings, and representing Mr. DeLouche and his wife in their separate family law matters, then I will have you brought into court so that you can explain your concerns to the judge, before we proceed. I do not believe my representation is a conflict of interest according to the Code of Ethics, and if I continue to represent you, I will do my very best to protect your rights and all matters concerning your case will remain confidential, but the decision is yours.

(Cont'd)

Appendix A

At a hearing on September 24, 1998, prior to the defendant's arraignment, defense counsel brought the matter to the attention of the trial court, telling Judge Godwin:

> The Violent Crimes Task Force was the agency that investigated the case. The chief of that office is Mr. Lucky DeLouche, whom I represent in family court matters, as well as his wife. Also on the Violent Crimes Task Force is Mr. Victor Salvador, who I also represent in family court matters. I have explained this to [the defendant], I have explained it to Mr. DeLouche and Mr. Salvador. I have prepared a written document for [the defendant] to sign. He has signed it. I have

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(Cont'd)

> Please circle and sign the below [sic] appropriate paragraph that better expresses your wishes:
>
> I, Thomas Cisco, Jr., understand that I have a right to request that Evelyn M. Oubre, be removed as my lawyer. I further understand, that if I choose to request her removal, I must do so immediately. I can not allow Evelyn M. Oubre to represent me for awhile and then decide that I no longer want her to represent me. Knowing that Evelyn M. Oubre represents Donald ["Lucky"] DeLouche and his wife in separate family law matters, and knowing that Evelyn M. Oubre will have contact with Lucky DeLouche and his wife concerning their matters, I WISH THAT EVELYN M. OUBRE REMAIN AS MY ATTORNEY.
>
> I, Thomas Cisco, Jr., wish to ask the court to remove Evelyn M. Oubre as my attorney.

> gone back over it with him again this morning, explained to him the potential conflict, although I do not see one, and according to the code of professional conduct, I do not see one, I want to be absolutely cautious and I want to do what [the defendant] requests of me. And it is my understanding as of still this morning [the defendant] desires that I remain as his lead counsel.

The trial judge then asked whether the defendant had read and understood Oubre's letter, and the defendant responded that he had. In attempting to explain a conflict of interest and how counsel's performance could be affected, the trial judge stated, "I can't sit here and think of a lot of different ways that some conflict can come up," but the judge did note that defense counsel was obligated to cross-examine Deputy DeLouche and bring out whatever she could that was helpful to the defendant's case. When informed that DeLouche would testify, the court again cursorily outlined a possible consequence of Oubre simultaneously representing both Deputy DeLouche and the defendant:

> [Court]: There is the—there is at least the potential, or the concern, for example, that you may at some point have some feelings that [defense counsel], because she represents Mr. DeLouche personally, isn't being as aggressive as you think she ought to be, or isn't pushing as much as she ought—I don't know, I'm just—that's just one little

way it could come up that would—that's what we call conflict.

[Def]: Right.

[Court]: As to whether—as to whether there's any concern that her duty to you to be—fully assert all your rights is going to be held back in any way because of any relationship or duty—client relationship she has with DeLouche. And the same goes for Mr. Salvador. And I can't sit here and forecast all the different little ways that something may come up there, but that's what we're talking about, is something like that. This letter [from Oubre to the defendant seeking a waiver] that we're talking about here uses the term conflict and everything, and I'm trying to flesh it out for you, for you to picture—so, do you see all of that?

[Def]: Yes, sir, I understand.

Additionally, the court determined that the defendant quit school in the eleventh grade, and sounded "articulate and able to understand" the proceedings around him. The court then ruled that defense counsel could continue to represent the defendant. Notably, the trial judge, as had defense counsel, effectively left it to the defendant to decide for

himself whether an actual conflict of interest existed because of Oubre's dual representation of the defendant and Deputy DeLouche.[15]

The issue of Oubre's dual representation arose just three weeks later on October 13, 1998, when the defendant was arraigned before a different judge. After the defendant entered pleas of not guilty, Oubre asked the court, Judge Minaldi, what it proposed to do with attorney John LaVern, the second chair appointed to the defendant's case, because of a conflict. Judge Minaldi stated that Judge Godwin had told her that his inquiry into both Oubre's and LaVern's conflicts had been brief. Judge Minaldi further stated that "it may be a better idea for me, at some point, to go into a more lengthy discourse with Mr. Cisco about what he understands about the conflict and put more of that on the record." Judge Minaldi opined that to have a hearing "may be required under [*Wheat v. United States,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)]," and that she wanted to "make sure that is done

15. Also at the September 24, 1998 hearing, originally convened to address a discovery issue, DeLouche testified that he was the director of the VCTF, the agency in charge of investigating the killings at KK's Corner. As such, he reported to the scene of the killings on the day that they happened, oversaw collection of all of the physical evidence at the scene, and supervised the extensive investigation of the crimes. He also secured either personally or at his direction a number of inculpatory statements from the defendant. Furthermore, DeLouche made the decision when to arrest the defendant formally, and oversaw the investigation of people the defendant mentioned as co-perpetrators. DeLouche testified at the hearing on the defendant's motion to suppress the statements, and extensively at trial. With the possible exception of Virginia Johnson, DeLouche represented the most important witness in the State's case.

adequately. . . ." Judge Minaldi, however, stated that she believed there was a problem with LaVern continuing to represent the defendant, yet, even though she had not conducted a hearing, Judge Minaldi was "confident" that there would be no problem with Oubre's continued representation of the defendant. LaVern withdrew three days later on October 16, 1998.[16] There is no indication in the record that Judge Minaldi ever conducted a hearing to determine either the particulars of Oubre's representation of DeLouche and his wife or what the defendant understood about Oubre's conflict of interest arising out of her dual representation of both him and Deputy DeLouche.

For the next few months, apparently on counsel's advice to the defendant, DeLouche and the defendant had no further contact. However, the defendant on January 20, 1999, sent a message to Deputy DeLouche that he wanted to talk to him. Although DeLouche first sent other Task Force members to talk to the defendant, including Vic Salvador whom Oubre also represented, DeLouche eventually visited the defendant in his cell, where the defendant complained of being in isolation and wanted medication for depression. After

16. Judge Minaldi noted that Judge Quienalty had appointed LaVern as second chair on account of his perceived conflict of interest. The only information in the record as to LaVern's conflict is his motion to withdraw, in which LaVern stated that there was a conflict between the defendant "and another person represented by the [Public Defender's Office]." Notably, the defendant was apparently not appointed a replacement for LaVern until a year and a half later on July 25, 1999, when Robert J. Pastor was also appointed to the case. The record shows that Pastor handled the penalty phase of trial, while Oubre was responsible for the guilt/innocence phase.

DeLouche promised to help him, the defendant wondered if they should tell his counsel about the meeting, but decided to tell her later when DeLouche said it was up to the defendant whether to do so. The defendant then proceeded to make another statement, the eleventh one so far, this time saying that three people were involved in the killings: the defendant and two others named Malcolm and Bobby. The defendant also agreed that he would accompany DeLouche to the New Orleans area where the defendant allegedly tossed the gun from the Causeway Bridge into Lake Pontchartrain and destroyed the videotape in an area near the Bonnet Carre Spillway.

On January 27, 1999, Deputy DeLouche and other members of the Task Force picked up the defendant to take him to LaPlace. When he was asked about telling Oubre, the defendant said it was not necessary and that she would not go anyway. Out at the Bonnet Carre Spillway, the defendant made additional inculpatory statements on tape, including that he was the shooter, but also saying that there was a fourth person involved. The next day, January 28, 1999, the defendant wrote another letter to Deputy DeLouche, which was immediately delivered to DeLouche by Russell Fleig, the jail chaplain. On January 29, 1999, the defendant was taken to Deputy DeLouche, who secured another statement from the defendant, this time saying that the fourth person, Chris Cabral, had actually been involved in the robbery and murders.

On January 29, 1999, Deputy DeLouche also secured the defendant's signatures on two waivers of confidentiality privileges he had with Chaplain Fleig, who had been

counseling the defendant since November of 1998, and the jail's medical director, Dr. Terry Welke, who was also the coroner who performed the autopsies on the three victims and who had prescribed the anti-depressant medication sought by the defendant. Fleig testified at trial that the defendant on January 28, 1999, stated he wanted to tell Fleig about what happened and to tell the Task Force everything he had said. Fleig related that the defendant admitted to shooting the victims and explained that he and three other men had come to Lake Charles from New Orleans to buy cheaper drugs. Eventually, in March of 1999, the defendant stopped meeting with Fleig. As for Dr. Welke, at some point prior to January 29, 1999, he had an occasion to question the defendant before prescribing him an anti-depressant. Dr. Welke testified at trial that the defendant told him that he had shot the victims and explained that he had done so trying to get money for drugs.

On March 18, 1999, the defendant told Deputy Corey Manuel, who worked at the jail, that he wanted to talk to him and that the statement could be recorded. After directly communicating this information to Deputy DeLouche, Manuel was provided with a tape recorder and waiver of rights form, and instructed in how to record the defendant's conversation. To Manuel, the defendant stated that the son of then Sheriff Wayne McElveen, Richard McElveen, had paid the defendant $10,000 out of a promised $20,000 to kill Stacie Reeves, because she knew too much about how her former boyfriend, Kevin Abel, had been killed in a drug-related matter in which McElveen was involved. There had been previous allegations that drugs were being trafficked out of KK's Corner and that Abel owed Richard McElveen

or other dealers a large sum of money. The Sheriff's Office, however, had deemed Abel's death a suicide, which Reeves, according to a friend who testified at trial, did not believe was true. The defense attempted to portray this statement to Manuel, in light of the wild rumors circulating through the jail and the local community about Richard McElveen, as another example of the defendant's many false confessions.

In May of 1999, the defendant made another inculpatory statement in a letter he wrote to a former girlfriend, Sharon Latino, stating that the defendant was going to take what was coming to him like a soldier. However, the defendant denied involvement in the numerous letters and telephone calls he made to Latino both before and after his letter of May 3, 1999.

On May 19, 1999, the defendant made still another inculpatory statement to Deputy Christina Lyons, a jailer at the Calcasieu correctional center, who was instructed by Deputy DeLouche to record the defendant's conversation without his knowledge. DeLouche knew that the defendant had been speaking to Lyons on a regular basis when she escorted him from isolation into the recreation yard. In the recorded statement given in the recreation yard, the defendant made inculpatory statements about being involved in the crime, discussed the upcoming sheriff's election, and referred to himself as a hero. Lyons explained at trial that the defendant had been placed in isolation after contacting a television station from a telephone inside the jail.

On November 8, 1999, over a year after both Judge Godwin and Judge Minaldi had been made aware of the issue

of Oubre's dual representation of DeLouche and the defendant, but still nearly a year before trial, counsel Oubre mentioned in open court before Judge Minaldi that the defendant had made several written allegations of collusion between her and Deputy DeLouche.[17] Believing that she had questioned the defendant previously about "this" at the beginning of the case and that the defendant had assured her that he wanted Oubre to remain as his counsel, Judge Minaldi, obviously agitated by the development, wanted to know what had since happened to change the defendant's mind. When informed that there were letters written by the defendant making allegations of collusion, the court, with both Oubre and DeLouche present in the courtroom, asked the defendant if he had "any doubts about whether [he] want[ed Oubre] to continue to represent [him.]" The defendant stated that he had none. The court then asked the defendant if he still wanted defense counsel to represent him, to which he replied that he did. The judge, however, made no inquiry of the defendant regarding his allegations of collusion and what may have caused him to believe that Oubre and DeLouche were plotting against him.

Eleven months later, the case went to trial in Calcasieu Parish, with a jury empaneled from an East Baton Rouge Parish jury pool. On October 9, 2000, testimony began. The trial ended nine days later with a guilty verdict and a sentence recommendation of death by lethal injection. The trial court subsequently sentenced the defendant in accordance with the jury's recommendation, and the instant capital appeal followed.

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17. The subject of the November 8, 1999 hearing was the defendant's motion to suppress the numerous inculpatory statements made to or under the direction of Deputy DeLouche.

Appendix A

DISCUSSION

On appeal, the defendant claims that Oubre labored under a conflict of interest, in that, at or around the time of trial, Oubre represented "Lucky" DeLouche in what defense counsel alternately termed "an unrelated civil matter" or "a family law matter." Defense counsel also represented DeLouche's wife in what counsel referred to as a "separate family law matter."

The right of a criminal defendant to the assistance of counsel during the proceedings against him is a cornerstone of our legal system. *State v. Franklin,* 400 So.2d 616, 620 (La.1981). "To be more than just a hollow right, our law requires that assistance of counsel be effective." *Id.* As a general rule, therefore, Louisiana courts have held that an attorney laboring under an actual conflict of interest cannot render effective legal assistance to the defendant she is representing. *Id.*

The issue of conflicting loyalties usually arises in the context of joint representation, but it can also arise "where an attorney runs into a conflict because he or she is required to cross-examine a witness who is testifying against the defendant and who was or is a client of the attorney." *State v. Tart,* 94-0025, p. 19 (La.2/9/96), 672 So.2d 116, 125; *State v. Kirkpatrick,* 443 So.2d 546, 552 (La.1983). In a pretrial context, regardless of how the conflict of interest issue arises, the trial court has two options to avoid a conflict of interest: appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interest is too remote to warrant separate counsel. *Tart,* 94-0025 at 19-20,

672 So.2d at 125 (relying on *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)); *State v. Edwards,* 430 So.2d 60, 62 (La.1983); *State v. Marshall,* 414 So.2d 684, 687-88 (La.1982). Failure to do one or the other in a case in which an actual conflict exists requires reversal. *Holloway,* 435 U.S. at 480, 98 S.Ct. at 1181; *State v. Carmouche,* 508 So.2d 792, 805 (La.1987) (on reh'g). As we stated in *Franklin,* 400 So.2d at 620, "If an actual conflict exists, there is no need for a defendant to prove that he was also prejudiced thereby."[18] Accordingly, in this case we are called upon to determine whether an actual conflict of interest existed and, if so, whether the defendant knowingly and intelligently waived his right to conflict-free counsel and whether the trial court took adequate steps to assure that defendant was afforded the very important requisite that the defendant's representation be conflict free.

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18. On the other hand, if the objection is made to the claimed conflict *after* trial, the defendant must show he was actually prejudiced. *Tart,* 94-0025 at 19-20, 672 So.2d at 125 (relying on *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

Appendix A

CONFLICT OF INTEREST

This court in *State v. Kahey,* 436 So.2d 475, 485 (La.1983), defined an actual conflict of interest as follows, accepting the definition set forth in *Zuck v. Alabama,* 588 F.2d 436, (5th Cir.1979), *cert denied,* 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979):

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to the other client.

This court has consistently held that a defense attorney required to cross- examine a current or former client on behalf of a current defendant suffers from an actual conflict. *See, e.g., State v. Carmouche,* 508 So.2d at 804; *Franklin,* 400 So.2d at 620 ("[W]e must agree with the defendant's attorney, and with the trial judge, that an actual conflict arose when the state called [counsel's former client] to the stand. [Counsel] was put in the unenviable position of trying zealously to represent the defendant at trial while simultaneously trying to protect the confidences of a former client who was testifying for the state against the defendant."); *see also* Dane S. Ciolino, ed., *Louisiana Rules of Professional Conduct,* Rule 1.7 comment 3 (L.S.B.A.2001) ("As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent.").

Appendix A

In *Carmouche,* a capital case in which this court reversed the conviction and sentence of death, we applied *Kahey* and *Zuck v. Alabama* and concluded that the defendant's counsel was confronted with an actual conflict of interest when another of his clients was arguably the most damaging prosecution witness against the defendant. There, the defendant's counsel was served on the last day of trial with notice that the State intended to introduce inculpatory statements the defendant had allegedly made to a jail cellmate, who had agreed to testify only the day before. In objecting to the timing of the notice, counsel also noted the possibility of a conflict of interest because he was also representing the prosecution witness in an unrelated criminal matter. Counsel did not, however, not seek to be relieved of representation, request a recess for developing impeachment evidence, or move for a mistrial, and the witness proceeded to take the stand to give damning evidence against the defendant. Nonetheless, in determining whether counsel was faced with a conflict of interest, we held that counsel's statement was sufficient to alert the trial court that an actual conflict existed and that counsel could have felt required to balance the competing interests of his two clients. *Carmouche,* 508 So.2d at 804. We then noted that, once a conflict of interest is deemed to exist, it is presumed that the conflict will affect defense counsel's performance. *Id.* at 805. We eventually went on to conclude in *Carmouche* that the trial court failed to take adequate steps to protect the defendant's Sixth Amendment right to conflict-free counsel, necessitating the reversal of his conviction and sentence. *Id.*

In the instant case, we find that a similar result is mandated, primarily because the record is silent as to the

particulars of defense counsel's representation of Deputy DeLouche and his wife. Even though counsel herself made the unsupported assertion that she was not under a conflict of interest, she obviously felt sufficiently concerned about her dual representation of the prosecution's leading witness and the defendant both to bring it to the attention of the trial court and to obtain, in advance of appearing in court, a written waiver from the defendant himself. The trial court, Judge Godwin, also recognized a conflict of interest in defense counsel's simultaneous representation of the defendant and one of the two most important prosecution witnesses in the State's case. However, perhaps relying too heavily on counsel's unsupported assertion, neither Judge Godwin nor Judge Minaldi took adequate steps on the record to determine whether counsel's conflict of interest was too remote to warrant the appointment of different counsel—such as inquiring of counsel as to the particulars of her representation of Deputy DeLouche and his wife. Instead, Judge Godwin, without any specific knowledge of counsel's representation of Deputy DeLouche and his wife, and thus unable to inform the defendant adequately of the conflict under which his appointed counsel labored and of how her representation of him could be negatively affected, nonetheless attempted to obtain from the defendant a knowing and intelligent waiver of his right to conflict-free counsel. Additionally, it appears from the record that Judge Minaldi's efforts were similarly inadequate to protect the defendant's rights, such as inquiring into the particulars of counsel's representation of Deputy DeLouche and his wife and explaining fully to the defendant his counsel's conflict of interest, because the record does

not establish that the hearing under *Wheat,* which she herself stated was necessary, had ever been conducted.[19]

In our view, then, given that two judges recognized that a waiver of conflict-free counsel was required on account of appointed counsel's dual representation of the defendant and Deputy DeLouche, and given that appointed counsel's other client, Deputy DeLouche, was one of the most important identity witnesses against the defendant, i.e., the head of the investigative task force who would be testifying at trial as to the defendant's various inculpatory statements connecting him to the scene of the crime in the absence of physical evidence, the only reasonable conclusion we can reach based on the record before us is that counsel was necessarily confronted with an actual conflict of interest when she was called upon to cross-examine her client Deputy DeLouche at the trial of her other client, the defendant. WAIVER and PROTECTION OF THE DEFENDANT'S RIGHTS

After the court has been alerted that an actual conflict of interest exists, the judge must take the proper steps to assure that the defendant's Sixth Amendment right to effective assistance of counsel is not violated. *Carmouche,* 508 So.2d at 804. As noted above, when a defendant raises the issue of

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19. Although the State insists that the district court must have held such a hearing at which she engaged in a more thorough discourse with the defendant, there exists no evidence in the record of such a hearing. The defendant further points out that counsel Oubre's time sheets do not reflect such a hearing. Since the record contains no indication that a hearing was ever conducted, this court can only assume that no such hearing transpired.

a conflict of interest prior to trial, the judge is required either to appoint other counsel or to take adequate steps to determine whether the risk of a conflict of interest is too remote to warrant other counsel. *State v. Edwards,* 430 So.2d 60, 62 (La.1983) (quoting *Holloway v. Arkansas*). Those steps were set forth in *Carmouche,* wherein we determined that the judge, while being mindful of the restrictions inherent in the attorney/client privilege, should first require the attorney to disclose the basis of the conflict. 508 So.2d at 805. Then, "[i]f the judge determines that the conflict is not too remote, he should explain the conflict to the defendant . . . and inform the defendant of his right to representation that is free of conflict." *Id.* Thereafter, if the defendant chooses to proceed with conflicted counsel, "a statement should be prepared in narrative form, which indicates that the defendant is fully aware of his right [to conflict free counsel] but has chosen to make a knowing and intelligent waiver thereof. *Id.* (citing *United States v. Winkle,* 722 F.2d 605 (10th Cir.1983), and *United States v. Martinez,* 630 F.2d 361 (5th Cir.1980)); *see State v. Odle,* 02-0226, pp. 19-20 (La.App. 3d Cir.11/13/02), 834 So.2d 483, 497; *State v. Sartain,* 98-0378, pp. 11-12 (La.App. 4th Cir.12/1/99), 746 So.2d 837, 846; *see also United States v. Schwarz,* 283 F.3d 76, 95 (2d Cir.2002); *United States v. Kliti,* 156 F.3d 150, 153 (2d Cir.1998).

We stress the importance of the trial judge's protecting the defendant's Sixth Amendment rights, even if a defendant expresses a desire to proceed with conflicted counsel. Because courts "possess an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear fair

to all that observe them[,]" *Wheat v. United States,* 486 U.S. 153, 160, 108 S.Ct. 1692, 1698, 100 L.Ed.2d 140 (1988), the defendant's ability to waive certain conflicts is not unfettered.[20] *Id.* For example, in *United States v. Fulton,* 5 F.3d 605, 612 (2d Cir.1993), the court stated, "When a lawyer's conflict, actual or potential, may result in inadequate representation of a defendant or jeopardize the federal court's institutional interest in the rendition of a just verdict, a trial judge has discretion to disqualify an attorney or decline a proffer of waiver." Nonetheless, a trial court ruling on potential conflicts when raised pretrial is entitled to broad discretion, regardless of whether the court permits or refuses enrollment of potentially conflicted counsel after a valid waiver. *Wheat,* 486 U.S. at 164, 108 S.Ct. at 1700.

This court has previously set forth the requirements for a knowing and intelligent waiver of the right to counsel unburdened by a conflict of interest. Before a defendant can knowingly and intelligently execute a valid waiver of conflicted counsel he must be told (1) that a conflict of interest exists; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has a right to obtain other counsel. *Sartain,* 98-0378 at 12, 746 So.2d at 846 (citing *State v. Castaneda,* 94- 1118, p. 5

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20. In *Wheat,* much like in the instant case, the defendant sought representation by an attorney already representing potential prosecution witnesses. *Id.,* 486 U.S. at 155-56, 108 S.Ct. at 1695. Unlike in the instant case, however, the district court in *Wheat* refused to allow potentially conflicted counsel to enroll. *Id.,* 486 U.S. at 157, 108 S.Ct. at 1696. The *Wheat* court affirmed, rejecting arguments by the defendant that he should be permitted to waive any conflict. *Id.,* 486 U.S. at 164, 108 S.Ct. at 1700.

(La.App. 1st Cir.6/23/95), 658 So.2d 297, 301)); *see also United States v. Garcia,* 517 F.2d 272, 276 (5th Cir.1975); *State v. Salinas,* 97- 0716, p. 5 (La.App. 3d Cir.10/29/97), 703 So.2d 671, 674; *Duncan v. Alabama,* 881 F.2d 1013, 1017 (11th Cir.1989).[21]

Applying the waiver requirements to the instant case, we find the waiver was not knowingly and intelligently entered into, nor did the trial court adequately facilitate such a waiver by ensuring that the defendant was fully informed of the consequences of proceeding with conflicted counsel. As to the first requirement, the defendant did have notice that a potential conflict of interest existed. However, as discussed below, the defendant was clearly left on his own in determining whether an actual conflict of interest existed. The defendant was, troublingly, presented with contradictory viewpoints. On one hand, the defendant's primary attorney was insisting there was no conflict of interest. On the other hand, the trial court apparently recognized that there might be a conflict of interest, but took no steps to inquire of counsel as to the particulars of her representation of the prosecution

21. Other jurisdictions employ similar tests or court rules. *See, e.g., United States v. Levy,* 25 F.3d 146, 153 n. 4 (2d cir.1994) (trial court should: 1) advise defendant of dangers arising from conflict; 2) determine through questions calling for narrative answers whether defendant understands risks and freely chooses to run them; 3) give defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel); *see also* Michigan Court Rule 6.005 (requiring before joint representation: 1) on the record reasons why conflict does not exist; 2) defendants' on the record waiver after inquiry; 3) finding that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding).

witness and his wife, nor for that matter her representation of the other VCTF detective, other than to accept at face value counsel's statement that the representations of DeLouche and his wife were separate family matters.

As to the second requirement, the court explained one of the potential consequences of continuing with current defense counsel when it addressed some of the potential problems counsel might have cross-examining one of her clients in an attempt to gain acquittal of the defendant. However, in her letter to the defendant seeking a waiver of his right to conflict-free counsel, Oubre expressed the unsupported conclusion that her representation created no conflict of interest. At no time did counsel shed any light on the nature of her representation of either DeLouche or his wife other than to say that it was in "separate family law matters."[22] The district court made no inquiry of counsel regarding the nature of the matters in which she represented DeLouche and his wife. Nor did the district court ever inquire of counsel as to the substance of the Lorenzi letter. Moreover, although at the arraignment on October 13, 1998, the district court acknowledged that going "into a lengthy discourse with [the defendant] about what he understands about the conflict and put[ting] more of that on the record . . . may be required under *Wheat* [,]" the court never engaged in such discourse with the defendant. Consequently, despite the fact that DeLouche's significant involvement in the defendant's case

22. As the United States Supreme Court noted in *Wheat* "the willingness of an attorney to obtain [conflict] waivers from [her] clients may bear an inverse relation to the care with which [s]he conveys all the necessary information to them." *Id.*, 486 U.S. at 163, 108 S.Ct. at 1699.

was readily apparent each time the defendant purportedly waived any conflict of interest counsel Oubre had because of her dual representation of DeLouche and the defendant, neither Judge Godwin nor Judge Minaldi had taken appropriate steps to put themselves in a position to inform the defendant of the true nature of his counsel's conflict and any effects it could have on counsel's representation and her defense of his rights.

Finally, as to the third requirement, that the defendant be informed that he has a right to obtain other counsel, the record does not reflect that he was ever so informed. Notably, in the letter seeking a waiver from counsel Oubre to the defendant, the choice counsel presents is whether he wishes to continue with her representation or not. Oubre's letter makes no mention of the court appointing other counsel in the event that the defendant did not want her to continue representing him. Likewise, at the September 24, 1998 hearing, the trial court mentioned only a potential peril of proceeding with conflicted counsel; it failed to set out any alternatives for the defendant to consider. At arraignment on October 13, 1998, the trial court did not even engage the defendant in a colloquy much less advise him of his right to be appointed conflict-free counsel. The trial court again failed to make such an advisement in November of 1999, when the defendant's allegations of collusion between DeLouche and Oubre surfaced.

Finally, we note that had the defendant decided to exercise his right to conflict-free counsel, the trial judge in this particular case could have taken a number of simple steps to safeguard the defendant's Sixth Amendment rights. *See*

Carmouche, 508 So.2d at 806, Lemmon, J., concurring on reh'g. In the instant case, for example, the trial judge could have easily appointed another attorney to represent the defendant, since on each occasion when the issue arose trial would not transpire for many months or years in the future.[23] Alternatively, the trial judge could have ensured that the cross-examination of Detective DeLouche was conducted by the "second chair" attorney, who was not similarly conflicted.

Conflicts of counsel, whether actual or potential, as well as unknowing waivers of conflicted counsel, take a heavy toll on the integrity of our judicial system and the public's confidence in the bench and bar. Because the record in this case does not establish that the defendant knowingly and intelligently waived his right to the assistance of conflict-free counsel, we reverse the defendant's convictions and sentence.

DECREE

For the reasons set forth above, the defendant's convictions and sentence are reversed, and the case is remanded to the district court for a new trial and the appointment of defense counsel.

REVERSED AND REMANDED.

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23. In fact, the first time the issue arose was only two days after counsel Oubre first met the defendant. At that point, the defendant could not yet have had any reasonable basis, either emotional, psychological, or tactical, in specifically continuing with conflicted counsel Oubre. The second time the issue arose occurred at arraignment just three weeks later, when the defendant's contact with his counsel remained similarly minimal.

Appendix A

SUPREME COURT OF LOUISIANA

NO. 01-KA-2732

STATE OF LOUISIANA

v.

THOMAS F. CISCO

ON APPEAL
FROM THE FOURTEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF CALCASIEU

VICTORY, J., dissenting

I dissent from the majority opinion because it appears to me the defendant clearly waived any potential conflict in this case. Therefore, I would either conditionally affirm the convictions and sentence and remand the case to the trial court to determine whether an actual conflict existed and whether the defendant validly waived the conflict, or, affirm the convictions and sentence and relegate the defendant to post-conviction proceedings.

Therefore, for the above stated reasons, I respectfully dissent.

APPENDIX B — ORDER OF THE SUPREME COURT OF LOUISIANA DENYING PETITION FOR REHEARING DATED JANUARY 16, 2004

SUPREME COURT OF LOUISIANA

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the *16th day of January, 2004*, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

* * *

REHEARING(S) DENIED:

2001-KA-2732 STATE OF LOUISIANA v. THOMAS F. CISCO, JR. (Parish of Calcasieu) VICTORY, J., would grant the rehearing.

* * * *

(2)

Supreme Court, U.S.
FILED
MAR 15 2004
OFFICE OF THE CLERK

NO. 03-1153

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

STATE OF LOUISIANA,
Petitioner

VERSUS

THOMAS FRANK CISCO,
Respondent

BRIEF IN OPPOSITION TO LOUISIANA'S
PETITION FOR WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

(THIS IS A CAPITAL CASE)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Thomas Frank Cisco requests leave to file the attached Brief in Opposition to Louisiana's Petition for Writ of *Certiorari* to the Louisiana Supreme Court without prepayment of costs and to proceed *in forma pauperis*. Petitioner has not attached a declaration of indigency in support of this motion, because his attorney has not yet had an opportunity to help him prepare it,

but will shortly be providing the declaration to the Court in support of this Motion.

Respectfully submitted,

Marcia A. Widder
The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

NO. 03-1153

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

STATE OF LOUISIANA,
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VERSUS

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Respondent

BRIEF IN OPPOSITION TO LOUISIANA'S PETITION FOR WRIT OF *CERTIORARI* TO THE LOUISIANA SUPREME COURT

(THIS IS A CAPITAL CASE)

Marcia A. Widder
The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

Attorney for Respondent,
Thomas Frank Cisco

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether there can be any doubt that the Louisiana Supreme Court correctly found that an actual, rather than theoretical, conflict of interest arose when Respondent's lead trial attorney was required to cross-examine another client who was the State of Louisiana's principal witness against Respondent.

2. Whether the Louisiana Supreme Court correctly held that Respondent, who is of borderline intelligence, did not knowingly and intelligently waive his right to conflict-free counsel when he was neither fully advised of the nature and potential impact of his attorney's conflict of interest, nor informed that the trial court would appoint him new counsel in the event he chose not to waive his right to conflict-free counsel.

PARTIES TO THE PROCEEDING BELOW

State of Louisiana, Plaintiff/Petitioner

Thomas Frank Cisco, Defendant/Respondent

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BRIEF IN OPPOSITION TO LOUISIANA'S PETITION FOR WRIT OF *CERTIORARI* TO THE LOUISIANA SUPREME COURT

I. INTRODUCTION

In his direct appeal to the Louisiana Supreme Court, Respondent raised as the leading issue the conflict of interest under which his trial attorney labored due to her simultaneous representation of Respondent and his principal accuser, Donald "Lucky" DeLouche – the sheriff's deputy who spearheaded the criminal investigation in this case and who obtained the bulk of Respondent's numerous conflicting, and largely discredited, inculpatory statements.[1] Respondent argued that Holloway v. Arkansas, 435 U.S. 475 (1978), and Wheat v. United States, 486 U.S. 153 (1988), required reversal of his convictions and death sentences because the trial court was expressly advised of this serious conflict on several occasions, yet failed "either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." Holloway, 435 U.S., at 434. See Brief on Appeal, at 55-58; Reply Brief, at 7-14. Alternatively, Respondent urged that reversal was required under Cuyler v. Sullivan, 446 U.S. 335 (1980), and Mickens v. Taylor, 535 U.S. 162 (2002), because the record amply demonstrated that lead counsel's conflict of interest adversely affected her performance. See Initial Brief, at 58-65; Reply Brief, at 14-21. Respondent requested that in the event the court did not find reversible error in the record, that it remand this matter to the trial court in order to conduct a hearing to address the conflict of interest issues.[2] See Initial Brief, at 69; Reply Brief, at 21, n. 34.

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[1] No forensic evidence linked Respondent to this crime, which went unsolved for over a year. The only other evidence inculpating respondent was the testimony of a hypnotized witness who identified Respondent as a man she had seen at the location of the crime earlier that evening, even though this witness had never been able to give a description of the person she identified to be Respondent. Conflicted trial counsel did not move to suppress this identification, despite several meritorious grounds for its exclusion.

[2] Respondent additionally urged that, in the event the court did not reverse outright, a remand was (continued...)

The State of Louisiana's response to these claims was a blanket insistence that trial counsel's simultaneous representation of Respondent and the key witness against him did not create even a hint of a conflict. See State's Brief on Appeal, at 14-23.[3]

The Louisiana Supreme Court, after carefully parsing the complex and unusual facts of this case, and surveying the legal landscape under state and federal law, granted Respondent a new trial on the basis of lead counsel's actual conflict of interest. The lower court concluded that counsel's simultaneous representation of Respondent and one of the State's key witnesses against him created an actual conflict of interest because counsel could not competently cross-examine one of her clients on behalf of the other. The court held that reversal was required because the trial court had actual knowledge of the conflict of interest and acknowledged that, under Wheat, the issue required the court's attention, yet it failed either to take adequate steps to ensure that Respondent's right to competent representation was preserved or to obtain a knowing and intelligent waiver of his right

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[2](...continued)
necessary because uncontradicted evidence in the record established that Respondent may be mentally retarded, see *infra* at 8-9, n.10, and because the appellate record contained sufficient evidence – including an eve-of-trial suicide attempt – to suggest that Respondent may not have been competent at the time of his capital trial. Initial Brief at 89-90; Reply Brief, at 38-44.

[3] Before this Court, the District Attorney's Office continues to insist that no conflict of interest arose from trial counsel's concurrent representation of Respondent and DeLouche. See State's Brief at 5, 7-8, 20-21, 23. Nonetheless, two days after filing the State's petition for writ of *certiorari* in this Court, the District Attorney's Office successfully moved to recuse itself from further involvement in this case. See *State's Motion and Order for Recusation of the District Attorney's Office* ("Recusation Motion")(without attached copy of the lower court decision in this case)(Appendix A hereto) and Order dated February 11, 2004 (Appendix B hereto). In the motion, the District Attorney urged that it had a conflict of interest because one of the assistant district attorneys in the office, Richard Oustalet, Jr., currently represents DeLouche in various civil matters, including a family law matter against DeLouche's second ex-wife that Oustalet inherited from Respondent's trial attorney Oubre approximately a year ago. See Recusation Motion at 1 and Exhibit B thereto. Indeed, as Oustalet stated in the affidavit he supplied in support of the State's Motion:

> [A]s a result of this representation, affiant may have information which would be protected under the attorney-client privilege which may or may not be relevant to criminal proceedings in which Donald "Lucky" DeLouche is a key witness for the State of Louisiana.

Affidavit attached as Exhibit B to Recusation Motion (Appendix A hereto).

to conflict-free counsel.

The State of Louisiana, through the now-recused Calcasieu Parish District Attorney's Office, has filed a petition for writ of *certiorari* to review the Louisiana Supreme Court's opinion reversing Respondent's convictions and death sentences. As discussed below, the Louisiana Supreme Court correctly decided this case under both state and federal law, and there is no legitimate reason for this Court to review the lower court's decision.

II.
STATEMENT OF PROCEEDINGS

On October 8, 1998, a Calcasieu Parish, Louisiana, grand jury indicted Respondent on three counts of first degree murder for a triple homicide that occurred sometime after midnight on July 6, 1997, at a convenience store located in Lake Charles, Louisiana. R. 66. Prior to trial, the district court granted Respondent's unopposed motion to change venue on the basis of the extensive pretrial publicity generated in the case. R. 4-5. On October 17, 2000, a jury selected in East Baton Rouge Parish returned verdicts of guilty as charged on all three counts. Following the presentation of evidence on October 18, 2000, the jury imposed sentences of death on each count. R. 59-63. The death sentences were formally imposed by the trial court on November 7, 2000. R. 64-65.

On December 3, 2003, the Louisiana Supreme Court reversed Respondent's convictions and death sentences by a 6-1 vote. The court held that lead trial counsel labored under an actual conflict of interest that arose from her concurrent representation of Respondent and one of the key witnesses against him at trial. Because the trial court was notified of this conflict on several occasions, yet did not obtain a valid waiver of Respondent's right to conflict-free counsel or otherwise ensure that his right to counsel was protected, the court held, reversal was required.

On December 15, 2003, the State of Louisiana filed a timely application for rehearing in the Louisiana Supreme Court, seeking to have the matter remanded to the trial court for a hearing on the

conflict of interest issue.[4] In an effort to prove that Respondent's trial attorney, Evelyn Oubre, did not labor under a conflict of interest at the time she represented Respondent, the State appended to its application an affidavit it had obtained from Oubre in which she protested that her concurrent representation of Respondent and the principal witness against him did not create a conflict.[5]

On January 14, 2004, the Louisiana Supreme Court, by a 6-1 vote, denied the State of Louisiana's Application for Rehearing.

On February 9, 2004, the State of Louisiana, through the Calcasieu Parish District Attorney's Office ("the District Attorney's Office"), filed the instant petition for writ of *certiorari* in this Court, seeking review of the Louisiana Supreme Court's decision below. On February 11, 2004, the District Attorney's Office filed a motion in the trial court seeking to be recused from further involvement in this case on the ground that it has a conflict of interest because one of the assistant district attorneys in the Office currently represents Lucky DeLouche. See *State's Motion and Order*

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[4] The State's position on appeal had been directly contrary. Instead, it argued that the transparent lack of any possible conflict of interest rendered frivolous Respondent's request that the Louisiana Supreme Court remand the case for a hearing to address the conflict issue in the event the court did not reverse outright:

> The defendant's bold suggestion that his defense attorney, Ms. Oubre, the attorney who fought so hard for him during pre-trial proceedings and at his trial, would behave unethically and in violation of his constitutional rights is abhorrent, given the absolute lack of factual or evidentiary support for the defendant's assertion. In summary, no remand is necessary in this case, for this or any other issue.

State's Brief on Appeal, at 25.

[5] Oubre, in turn, appended to the affidavit she submitted to assist the State of Louisiana selected documents obtained largely from court records in cases in which Oubre represented DeLouche and his then-wife, Bethany Young, against their respective former spouses, *and* separate divorce proceedings in which Oubre represented DeLouche against his second ex-wife – and Oubre's former client – Bethany Young. Oubre, in turn, secured from her client, DeLouche, a so-called limited waiver of his attorney-client privilege, precisely so that she could present this evidence to the Louisiana Supreme Court in an effort to secure rehearing for the State. If this Court were to have any doubts that Oubre's representation of both Respondent and DeLouche resulted in divided loyalties incompatible with Respondent's right to counsel, Oubre's decision to assist the State of Louisiana in its efforts to reverse the decision vacating Respondent's convictions and death sentences should put those doubts to rest.

for Recusation of the District Attorney's Office (Appendix A hereto); see also *supra* at 2, n. 3. The motion was granted that day. See Order, dated February 11, 2004 (Appendix B hereto).

The District Attorney's Office has since notified undersigned counsel that the Louisiana Attorney General's Office will be handling this matter on behalf of the State of Louisiana and apparently sent a letter to that effect to this Court. See Letter dated March 1, 2004, from C. Sigler to M. Widder, and attachments (Appendix C hereto). As of this date, however, this Court's docket does not reflect either that the District Attorney's Office has withdrawn as counsel or that the Attorney General has entered its appearance in this matter, although the Attorney General's Office mistakenly appears listed as counsel for Respondent.[6]

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[6] The Attorney General's Office itself may have a conflict of interest in this matter. In the course of one of the family law matters in which Respondent's attorney, Evelyn Oubre, was representing DeLouche at the time of she was appointed to represent Respondent in this case, DeLouche was accused of serious criminal misconduct by his former wife, Rebecca Kellogg. Indeed, the charges were sufficiently inflammatory that the family court record has been and remains sealed.

By the State's own admission below, the criminal investigation of DeLouche arising from these charges was turned over to the Attorney General's Office. As the State explained below, in arguing that it had not violated Brady v. Maryland,373 U.S. 83 (1963), by failing to disclose the criminal investigation of DeLouche:

> [A]ll reports generated in the investigation of the criminal charges brought against Deputy DeLouche (as well as the responsibility for investigating and prosecuting the offense, should this be required), were turned over [to] the Louisiana Attorney General's Office – the Calcasieu Parish District Attorney's Office did not even retain a copy of the filed report.

State's Brief on Appeal, at 55.

Furthermore, the Attorney General's Office investigated DeLouche's second ex-wife, Bethany Young, in at least two separate criminal matters, one of which was related to the investigation of DeLouche. Young may well be a witness in future proceedings regarding misconduct by DeLouche in Respondent's case.

Accordingly, in the event this Court grants the State's petition for writ of *certiorari*, Respondent anticipates that he may have to file a motion to disqualify the Attorney General's Office should it, in fact, appear as counsel for the State of Louisiana.

III.
STATEMENT OF RELEVANT FACTS

A. *Evelyn Oubre's Client, Dep. Lucky DeLouche, Orchestrated the Murder Investigation That Ultimately Led to Respondent's Arrest and Personally Conducted or Supervised Virtually All of Respondent's Custodial Interrogations*

Some time after midnight on January 6, 1997, Stacie Reeves, Marty LeBoeuf and Nicole Guidry were shot to death in the cooler of KK's Corner Convenience Store in Lake Charles, Louisiana. Their bodies were discovered when a store employee arrived early that morning to open the store for business.

Under DeLouche's supervision, the Calcasieu Parish Violent Crimes Task Force ("the Task Force") began an extensive investigation, interviewing present and former employees of the store and following up on a multitude of leads that were called in to the Task Force hotline in response to its request that the public come forward with any information it had.[7] R. 3444. DeLouche enlisted the FBI's assistance as well. R. 3445. The lengthy investigation identified an assortment of suspects – including the son of DeLouche's employer, Wayne McElveen, the Calcasieu Parish Sheriff. Despite numerous leads, the case went "unsolved" for over a year.[8]

Although several individuals who passed the store on the night of the crime (as well as the store owner and the father of one of the victims) reported that the store had closed normally at midnight, the Task Force quickly focused on Virginia Johnson, an individual who had been in the store at some point prior to closing, as the key to breaking the case. Johnson told investigators that

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[7] Throughout its existence, DeLouche was the Director of the Task Force and supervised all the Task Force investigations. R. 3430. Although, pursuant to the Task Force rotation system, another Sheriff's Office employee, Larry Kelland, was initially assigned to be the lead investigator in the KK's Corner murder case, R. 3432, 3435, Kelland testified that "in actuality, Deputy DeLouche was the main investigator through it. He did the report and everything else." R. 4239.

[8] The case remains under investigation. A website for the Calcasieu Parish Sheriff's Office lists the KK's Corner murders as a "cold case" still being investigated. See www.cpso.com/pages/coldcase/UnsolvedCases.html.

she had gone to the store to buy gas between 11:35 and 11:45 p.m. on July 5,1997. R. 324. While there, two white men entered the store. Johnson was able to describe the first man who entered through the front doors in sufficient detail for investigators to draw a composite sketch. R. 326. The second man entered the store as Johnson was exiting and they bumped into each other. Johnson was unable to provide a description of this man, beyond stating that he was taller than the first one, and, indeed, indicated that "she didn't notice the second white male much and could not describe him." R. 325. The two men apparently made her uneasy for some reason and she drove away from the store before she had finished pumping all the gas she had purchased into the tank of her pickup truck. Id.

In order to discover more about these two men, investigators had Johnson hypnotized. Under hypnosis, Johnson stated that the second man – whom she could still not describe – had a key chain that had the words Marlboro and a rabbit head figure on it.

In an effort to identify more suspects, the Task Force enlisted help from the television show, America's Most Wanted ("AMW"). The show aired a "re-enactment" of the crime on January 24, 1998, that was based on information provided by Johnson and investigators' speculation about what happened at the store. In the broadcast, the second man was shown with a rabbit's foot key chain hanging out of his pocket and the key chain was highlighted as an important new clue. The same day as the broadcast, Lonnie Kemp, a Lake Charles resident, called AMW to report that "she knew a white male with whom she had talked before who had a rabbit foot key chain and knew the white male knew Stacie Reeves. She advised the white males [sic] name was Thomas Cisco and she thought he was living in the New Orleans, La. area at this time." R. 428. On the basis of this tip, the New Orleans office of the FBI was assigned the task of tracking down Respondent.[9]

[9] The rabbit's foot key chain was the "clue" that broke the case. It is difficult to imagine evidence (continued...)

The FBI eventually located Respondent, an emotionally troubled man with a low IQ and a history of suicide attempts and drug addiction.[10] The FBI interviewed him initially on May 12 and

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[9](...continued)
that could have been more easily impeached considering the curious development of this particular critical detail:

- Johnson (in her second interview) initially attributed the key chain to the first man whom she saw (*i.e.* not Respondent) and described it as "somewhat round in shape, [with] the word 'MARLBORO' . . . visible written in blue color, an animal figure, not further able to be described, . . . visible in a brown or tan color; and the background of the key chain . . . a white color." R. 2281.

- Prior to being placed under hypnosis, Johnson advised the hypnotist that one of the men had a key chain with "[l]ike a Marlboro monkey . . . a little symbol of Marlboro . . . you know, it was in blue writin' and they had the little animal on top of it or whatever it was." Transcript of Virginia Johnson's pre-hypnotic and hypnotic interview. (Appellate Appendix ("AA") at 34-35).

- While under hypnosis, Johnson attributed the key chain to the second, rather than first, man she saw and described it as "a round key chain. You can see the Marlboro is in blue writin' and they have like a symbol of the cigarette pack, I guess, like an animal or somethin. And I noticed they have a rabbit's head on it, on the key chain." Id. (AA at 71).

- There was no mention of a rabbit's foot key chain as a clue to the KK's Corner murders until it was shown as an important new fact on America's Most Wanted in January 1998.

Despite the ease of impeaching this evidence, Respondent's conflicted trial attorney presented none of these facts to the jury. At oral argument before the Louisiana Supreme Court, in response to questions by Justices Knoll and Weimer, Assistant District Attorney David Kimball stated that he could not explain how the key chain had "morphed" into a rabbit's foot key chain.

[10] Uncontroverted evidence presented at trial established that Respondent has severe intellectual limitations and may be mentally retarded. Dr. Ted Friedberg testified that Respondent scored 70-75 on his IQ tests, R. 4086 – scores that are within the outer border of mild mental retardation. Dr. Sarah Deland testified that Respondent is in the range between borderline intellectual functioning and mild mental retardation and may be at the high end of mild mental retardation. R. 4288-89. Dr. Mark Zimmerman testified that, based on tests he administered, Respondent functions roughly between the bottom first and bottom third percentile in the population. R. 4265.

It is well recognized that "those with mental limitations are at special risk of false confessions." Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 Harv. J.L. & Pub. Pol'y 523, 583 (1999). See, e.g. GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 144 (1992); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 131 (1997). See also Atkins v. Virginia, 536 U.S. 304, 320 (2003) (noting that individuals with mental retardation are particularly vulnerable to giving false confessions).

Although the intended defense in this matter was that Respondent's numerous confessions were false, the trial court's rulings effectively prevented Respondent from presenting any evidence to support this theory of the case. The Louisiana Supreme Court did not reach the several claims arising from the trial (continued...)

13, 1998. During these unrecorded interviews, Respondent admitted to knowing one of the victims, Stacie Reeves, but denied involvement in the crime, although he also stated that he had a significant drug problem at that time and it was possible that he was involved but did not remember because of the drugs. R. 3470. Respondent said he had spent the July 4th weekend with friends in the New Orleans area. R. 3537.

The FBI re-interviewed Respondent in New Orleans on August 26, 1998. After more than five hours of unrecorded questioning, Respondent provided a written inculpatory statement on the basis of which he was transported to Lake Charles in an FBI airplane and, some time later, formally arrested and charged with the KK's Corner murders. During the course of the investigation, Respondent made numerous, inconsistent statements inculpating himself and a variety of others in the murder – all of which were essentially discredited by subsequent police investigation – as well as several exculpatory statements.[11] Dep. DeLouche personally conducted many of the interrogations and supervised virtually all of the remaining interrogations.

No forensic evidence links Respondent to the crime. Instead, the convictions and death sentences in this matter rest solely on Respondent's numerous inconsistent statements and Virginia Johnson's post-hypnotic identification of him as the second man whom she could never describe.[12]

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[10](...continued)
court's rulings in this regard.

[11] The sheer volume of statements taken in this case is extraordinary. The transcribed audio- and videotaped statements alone amount to approximately 400 pages of the record. See R.554-679, 681-763, 766-826, 828-58, 860-900, 910-60, 962-64. In addition, Respondent provided several unrecorded statements and wrote a substantial number of statements and letters. See R. 188, 190-94, 965-98, 901-07, 961, 970-88, 990-1007, 2020-25.

[12] Johnson identified Respondent as the second man shortly after his arrest, *i.e.* more than a year after the crime. Putting aside the question of whether a post-hypnotic identification that lacks independent indicia of reliability constituted admissible evidence, the physical lineup at which Johnson identified Respondent was conducted in the absence of counsel, despite the fact that Respondent's right to counsel had attached and, indeed, counsel had finally been appointed that very morning, several hours before the lineup was conducted.
(continued...)

B. *The Trial Court Appointed the Lawyer Who Represented DeLouche in Contentious Divorce and Custody Matters as Respondent's Lead Attorney in This Capital Case*

Respondent was formally arrested on pretextual robbery charges at 2:40 a.m. on August 27, 1998, and booked into jail in another parish.[13] Over the next several days, he gave a variety of inculpatory and exculpatory statements.

On September 1, 1998, Respondent was given his initial appearance in court and Evelyn Oubre was appointed to represent him. At the time she was appointed and throughout much, if not all, of the proceedings below, Oubre also represented DeLouche in a variety of matters,[14] including divorce proceedings and/or custody disputes that involved allegations brought by his ex-wife that were so scandalous that the proceedings were sealed – and remain so today.[15]

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[12](...continued)
The lineup was not videotaped or otherwise recorded. Respondent's conflicted trial counsel did not move to suppress the identification.

[13] DeLouche's Supplemental Police Report, and his suppression hearing and trial testimony, clearly establish that Respondent was arrested on robbery charges, instead of first degree murder charges (and booked into the DeQuincy, rather than Calcasieu, Parish jail), so that the media would not be alerted to the fact that someone had been arrested for the KK's Corner murders. See R. 461-62, 3667; R. (Vol. 25), at 15, 37. It was not until August 28, 1998, that an arrest warrant was issued charging Respondent with the KK's Corner murders and he was formally arrested on those charges. R. 468-69. He was brought to the Calcasieu Parish Correctional Center and held in isolation on suicide watch for several days without being taken before a judge for the appointment of counsel – even though he had expressly requested counsel during an interrogation conducted by DeLouche on August 28, 1998.

[14] On May 12, 1999, at his initial deposition in a civil suit brought by the victims' families against, *inter alia*, the Calcasieu Parish Sheriff's Office, DeLouche identified Evelyn Oubre as his private attorney, although she did not make an appearance on his behalf at that proceeding. See Deposition of Lucky DeLouche, dated May 12, 1999, at p. 8 (AA at 183). This civil suit was pending at the time of Respondent's trial.

[15] Undersigned counsel has obtained documents that she believes pertain to the allegations brought against DeLouche in these sealed proceedings. Because of the sensitive nature of this material, she filed some of these documents under seal in the Louisiana Supreme Court. In the event this Court needs further information relative to the charges against DeLouche, undersigned counsel will submit such materials to the Court for its review.

C. ***Respondent Did Not Knowingly and Intelligently Waive His Right to Conflict-Free Counsel Because He Was Never Informed of the True Nature of Oubre's Conflict and Its Potential for Crippling His Defense, and Was Never Advised that the Trial Court Would Appoint Him Another Attorney Should He Object to Oubre's Simultaneous Representation of His Chief Accuser***

By letter dated September 16, 1998, Oubre informed Respondent that she represented Dep. DeLouche and his wife in separate "family law matters." She advised that she did not think that she had a conflict of interest and left it to Respondent to determine whether there was a conflict. The body of this letter is quoted in full below:

> As you are aware, I have been appointed as lead counsel in your criminal matter. Before we discuss any facts concerning your case, I want you to be aware that I am the attorney for the lead investigator for the Violent Crimes Task Force, Mr. Lucky DeLouche. I represent Mr. DeLouche in a family law matter. I also represent Mr. DeLouche's wife in a separate family law matter. **If *you* believe that there is a conflict in [sic] interest in my representing you in your proceedings, and representing Mr. DeLouche and his wife in their separate family law matters, then I will have you brought into court so that you can explain your concerns to the judge, before we proceed. I do not believe my representation is a conflict of interest according to the Code of Ethics**, and if I continue to represent you, I will do my very best to protect your rights and all matters concerning your case will remain confidential, **but the decision is yours**.
>
> Please circle and sign the below appropriate paragraph that better expresses your wishes:
>
> > I, Thomas Cisco, Jr., understand that I have a right to request that Evelyn M. Oubre, be removed as my lawyer. I further understand, that if I choose to request her removal, I must do so immediately. I can not allow Evelyn M. Oubre to represent me for awhile and then decide that I no longer want her to represent me. Knowing that Evelyn M. Oubre represents Donald DeLouche and his wife in separate family law matters, and knowing that Evelyn M. Oubre will have contact with Lucky DeLouche and his wife concerning their matters, I WISH THAT EVELYN M. OUBRE REMAIN AS MY ATTORNEY.
> >
> > I, Thomas Cisco, Jr., wish to ask the court to remove Evelyn M. Oubre as my attorney.

AA at 177 (copy of "waiver of conflict" letter)(italics original; bold supplied) (quoted in full in State

v. Cisco, 861 So.2d 118, 125, n.14 (La. 2003) (Appendix A to State of Louisiana's Petition for Writ of *Certiorari* [hereinafter "Louisiana's Appendix A"], at 12a-13a, n.14).[16]

Respondent circled and signed the portion of the letter indicating that he wanted Oubre to remain as his attorney. See AA at 177.

On September 24, 1998, at a hearing before Hon. Fred R. Godwin, to consider the State's motion to obtain hair and fluid samples from Respondent, the court briefly addressed the conflict issue brought to his attention by Oubre.[17] Oubre advised the trial court that she represented DeLouche and his wife, and Dep. Vic Salvador in "family court matters"; that she had explained this to Respondent, DeLouche and Salvador; that she had prepared a written document for Respondent to sign; and that he had signed it. Supp. R. (lodged 10/7/02) (Appendix D), at 18. She further advised that "I have gone back over it with him again this morning, explained to him the potential conflict, *although I do not see one, and according to the Code of Professional Conduct, I do not see one,* I want to be absolutely cautious and I want to do what Mr. Cisco requests of me. And it is my understanding as of still this morning Mr. Cisco desires that I remain as his lead counsel." Id. at 18-19 (emphasis supplied).

At the waiver hearing, neither Respondent, nor Judge Godwin, was informed of the true character of the conflict as Oubre did not disclose the nature of her representation of DeLouche in

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[16] In this letter, Oubre did not inform Respondent of the nature of her representation of DeLouche and, indeed, could not since the proceedings in which she represented DeLouche were under seal. Oubre did not inform Respondent that the court would be required to appoint another attorney to represent him if Oubre were removed as counsel. Oubre incorrectly advised him that he had to make this decision immediately and that she could not be removed as counsel once she had commenced representing him.

This letter was written after Oubre had already met with Respondent for approximate 1.25 hours on September 15, 1998, and presumably discussed his case. R. 1808. Although the Court may question why Oubre would want to persist in representing Respondent if she truly had a conflict of interest, she had a considerable financial interest in this appointment. Upon information and belief, Oubre has been paid upwards of $100,000 in this case.

[17] A transcript of the entire colloquy is attached as Appendix D hereto.

the sealed "family law matter." Moreover, the trial court never explained to Respondent what was meant by the phrase "conflict of interest" and its discussion of the possible effects of a conflict in this matter did little to elucidate its meaning:

> Let me just point out. I can't sit here and think of a lot of different ways that some conflict can come up, but let me just give you one that comes to mind, and let you be sure you see what we're talking about here. For example, let's suppose that Mr. DeLouche ends up being a witness for the State against you, giving testimony that's harmful to your case. Ms. Oubre is obligated to cross examine him and try to bring out whatever she can bring out that's helpful to your case.
>
> [The prosecutor interjects that DeLouche will be a witness for the State.]
>
> Well, okay, it – well, you've heard that said now, that he will be a witness. All right. There is the – there is at least the potential, or the concern, for example, that you may at some point have some feeling that Ms. Oubre, because she represents Mr. DeLouche personally, isn't being as aggressive as you think she ought to be, or isn't pushing him as much as you think she ought – I don't know, I'm just – that's just one little way it could come up that would – that's what we call conflict. [Mr. Cisco states, "Right."]
>
> As to whether – as to whether there's any concern that her duty to you to be – fully assert all your rights is going to be held back in any way because of any relationship or duty – client relationship she has with DeLouche. And the same goes for Mr. Salvador. And I can't sit here and forecast all the different little ways that something may come up there, but that's what we're talking about, is something like that. This letter that's written here uses the term conflict and everything, and I'm trying to flesh it out for you, for you to picture – so, do you see all of that?

Id. at 20-22.

This was the sum total of the trial court's explanation of the conflict. The court's words indicated that a conflict would do no more than possibly make Respondent feel slightly unsatisfied with his attorney's cross-examination of DeLouche and that a conflict of interest might present "different *little* ways" that Respondent's representation could be affected. The trial court did not explain that a conflict of interest meant that defense counsel may not be able to perform her job competently because she had opposing obligations to another client. The judge did not explain that Oubre owed DeLouche a duty to honor his client confidences and thus could not seek to cross-

examine him on any issues that she had learned from DeLouche during her representation of him, absent a waiver of DeLouche's attorney-client privilege.[18] At no time during the waiver hearing did the trial court inform Respondent that if Oubre were removed as his attorney, the court would appoint him new counsel.

Respondent's responses at the hearing, moreover, provide little basis to conclude that he knowingly and intelligently waived anything. During the waiver colloquy, Respondent spoke a total of forty-three words. Sixteen of these were the phrase "Yes, sir" repeated eight times. During the portion of the colloquy addressing the possible effects of the undefined conflict, Respondent uttered only one word containing more than one syllable – when he stated "Yes, sir, I understand." Id. at 22. After indicating monosyllabically that he understood the conflict and had no problem with it, Respondent answered the court's questions about his education and former employment, explaining, "I quit [school] in the 11th grade," and "I've done anywhere from roofing to building house [sic] and ceramic tile."[19] Id. at 23. On the basis of this information, the trial court concluded that "you certainly sound sufficiently articulate and able to understand – you understand everything I've said here." Id. To which Respondent compliantly responded: "Yes, sir." Id. Noting that "I'm satisfied that the matter can proceed and that whatever conflict that might be can be and has been waived, and I'm going to file the letter in the record," id., the trial court moved on to address other matters.[20]

At the time the trial court accepted Respondent's waiver, it was unaware of the serious nature

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[18] This would include information that an unconflicted attorney could have discovered from other sources.

[19] The remaining words spoken by Respondent at this hearing were: "Right," id. at 21; and "Yes, I do," "Yes, I am," and "No." Id. at 22.

[20] Lest it be forgotten, Respondent tests in the range of mild mental retardation or borderline intelligence, see *supra* at 8-9, n.10 – a factor that clearly impacts any assessment of the knowing or intelligent nature of his waivers of constitutional rights.

of the conflict. It was soon provided important information bearing on this issue, however. On or about October 9, 1998, Thomas Lorenzi, a local attorney who had been following the case, wrote to Judge Godwin to express his concerns about Oubre's continued representation of Respondent in light of her significant conflict of interest. In the letter, Lorenzi advised the court that Oubre's conflict was far more egregious than it may have appeared at the hearing conducted two weeks earlier:

> From what I understand [about the September 24 hearing], Evelyn obtained waivers from all three clients and you questioned Mr. Cisco to satisfy yourself that he wanted Evelyn to represent him. I am compelled to write because there is one thing I feel sure you did not know and there is a second that you may not have known. *Delouche's domestic file is under seal. I question how Evelyn could have explained potential conflicts to Cisco unless she had obtained an order unsealing the record, or relieving her from that obligation. The information among the bar, or at least the defense bar, is that the pleadings were placed under seal because there were allegations of criminality . . . made against Delouche.* An investigation was conducted and I know that there was talk at one time that Delouche was going to leave the Sheriff's office and move.

Letter, dated October 9, 1998, from Thomas Lorenzi to Hon. Fred Godwin, Jr. (attached in redacted form as AA at 186-87) (emphasis supplied). See also Cisco, 861 So.2d at 120-21 (La. 2003) (Louisiana's Appendix A, at 3a-4a).[21] Lorenzi's letter further explained that, under Wheat v. United States, 468 U.S. 153 (1988), and progeny, the court had the authority to disqualify Oubre despite Respondent's supposed waiver of conflict-free counsel because a defendant's "choice of counsel must yield when there is a serious potential conflict even when the defendant expressly desires to waive the conflict." AA at 187. Judge Godwin later reported to Lorenzi that he had passed a copy of his letter on to the judge to whom the case had been allotted, Hon. Patricia Minaldi. AA at 185 (Affidavit of Thomas L. Lorenzi, ¶ 5).

On October 13, 1998, at the time of Respondent's arraignment, Oubre asked the court what

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[21] The copy of the letter included in the appendix to the Brief on Appeal was redacted to prevent disclosure of the nature of the alleged criminal charges. Respondent filed an unredacted copy of the letter under seal in the Louisiana Supreme Court.

it proposed "to do in reference to the conflict that Mr. LaVern, second chair, has?" Supp. R. (lodged 7/12/02), at 10. In response, the court stated:

> I spoke with Judge Godwin about the hearing that he had, both on the conflict that you brought to his attention, and the conflict that, to my knowledge, was brought to his attention by Mr. LaVern. *He was of the opinion that his inquiry into both conflicts, actually, was brief. I think under* ***U.S. vs. Wheat****, it may be necessary, just to protect the record*, and I have no doubts, Ms. Oubre, that if there were even the specter of a potential conflict that you thought was genuine, you would have brought that to the attention of the Court and asked to be disqualified yourself. I don't have any doubt that that doesn't exist, but *I think just to protect the record, and for possibilities of post-conviction relief, it may be a better idea for me, at some point, to go into a more lengthy discourse with Mr. Cisco about what he understands about the conflict and put more of that on the record. I think that may be required under* ***Wheat****, and I want to make sure that that is done adequately*, especially with Mr. LaVern, who I think the potential is evident, and yours, I don't think is.

Id. at 10-11 (bold emphasis original, italics supplied). The court indicated that it would conduct a hearing on the matter later in the week. Id. at 13. No such hearing ever took place.[22]

Some time later, Respondent apparently began to develop suspicions about his attorney's divided loyalties. These are reflected in documents disclosed by the State during discovery in which Respondent expressed his belief that Oubre and DeLouche were together working against him. In a document dated November 29, 1998, he wrote:

> The attorney that I was apointed [sic] represented Lucky D. in another matter of some kind. Her name is Evelyn Oubre. I didn't like the idea of her representing me & Lucky D. at the same time. Every time Lucky sees me he tells me to tell my attorney the truth. Well at the time that Evelyn Oubre was my lawyer, he did & that was every time he came to CCC & saw me that he would say that. To be honest I think Lucky D. & Evelyn Oubre use [sic] to talk about my case to each other & I think he was paying her off to hang me with this crime. I don't know that for sure but I bet he was. At least that [sic] what I think & believe.

R. 982.

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[22] The Louisiana Supreme Court concluded that the Wheat hearing that Judge Minaldi believed was necessary never actually occurred, given the absence of any evidence of it in the appellate record and Oubre's meticulous time records. See Cisco, 861 So.2d 118, 131 and 131 n.19 (La. 2003) (Louisiana's Appendix A, at 26a-27a and 27a, n.19.

In another document written the same day, he reported:

> These are my openions [sic] –> Evelyn Oubre is or was being paid off by Lucky D. of the Task Force here in Lake Charles La. for info about my case. Why do I think this. Because I know that Evelyn Oubre is close friends with Lucky D. She told me so herself & plus she represents Lucky D. in a family matter in court. When I was in intake here in Calcasieu Correctional Center Lucky would always ask me when he saw me if I was telling Evelyn the truth & other times he would tell me to tell her the truth.

R. 967.[23]

These writings were eventually brought to the attention of the trial court at a hearing conducted on November 8, 1999, to address Respondent's motion to suppress his various statements. At the beginning of the hearing, the following exchange took place:

> Ms. Oubre: [P]rior to going to the Motion to Suppress, I'd like the defendant placed under oath and the Court question him as to whether or not he wishes for me to continue to represent him. Once the discovery had been provided to me by the State, there was information contained therein that Mr. Cisco thought that Mr. "Lucky" DeLouche and I were in collusion together, and I want that solved once and for all.
>
> The Court: Okay. Now, Ms. Oubre, if I remember correctly, this came up in the very beginning, the very inception of this case, and I questioned Mr. Cisco about it at that time, and he assured me that he wanted you to remain as his attorney. Are you telling me that there's something that has happened since that has changed that?
>
> Ms. Oubre: I have seen letters that he has written that contains that in it.
>
> The Court: That Mr. Cisco has written?

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[23] These writings indicate, moreover, that DeLouche continued to have contact with Respondent following his August 31, 1998, recantation and the appointment of his albeit conflicted attorney – a fact corroborated by DeLouche's Supplemental Police Report. See R. 1262-63. Oubre failed to bring this to the attention of the court in the suppression hearing, even though this fact was clearly relevant to Respondent's contention that his inculpatory statements were obtained in violation of his constitutional rights. Oubre, moreover, failed to cross-examine Dep. DeLouche about his continued contact with the defendant, even though DeLouche testified, at trial, that neither he nor any Task Force investigator had any contact with Respondent during the period following the appointment of counsel on September 1, 1998, until January 20, 1999, when Respondent requested that DeLouche come to see him. Of course, the fact that Oubre advised the trial court that Respondent had written these letters complaining about her suspected collusion with Lucky DeLouche means not only that she had these documents in her possession, but that she had read them.

Ms. Oubre: Yes, ma'am.

The Court: All right. Mr. Cisco, approach the microphone right there between our attorneys, right there. You heard what Ms. Oubre just had to say?

Defendant: Yes, ma'am.

The Court: Do you have any doubts about whether you want her to continue to represent you?

Defendant: No.

The Court: You want her to continue to represent you?

Defendant: Yes, ma'am, I do.

The Court: All right. Thank you.

Supp. R. (lodged 10/8/01), at 4-5. As noted, despite the court's apparent belief that it had previously questioned Respondent regarding Oubre's conflict of interest, the record does not reflect that any such hearing was conducted.

D. ***Oubre's Representation of DeLouche Significantly Impaired Her Ability to Cross-Examine This Critical State Witness on Behalf of Respondent***

In the course of representing Respondent, Oubre had occasion to cross-examine her other client, DeLouche, on three occasions – at hearings conducted on November 8 and November 18, 1999, to address Respondent's motion to suppress his numerous statements (which was denied in its entirety), and at trial.[24] During these examinations, Oubre did virtually nothing to attack either DeLouche's credibility or his professional competence, even though such an approach was essential

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[24] There would have been at least a fourth occasion had counsel taken the rather obvious step of moving to suppress Virginia Johnson's unreliable identification of Respondent as the second man whom she could never describe – even after being hypnotized. In addition to other infirmities in the identification, a solid basis for excluding this identification was the fact that DeLouche went forward with the physical line-up after the Respondent's right to counsel had attached and he had been appointed Oubre as his lawyer, see United States v. Wade, 388 U.S. 218 (1967), even though Respondent would not sign the waiver of rights form that DeLouche presented to him. As this motion was never filed, Oubre did not cross-examine DeLouche on this subject and Johnson's out-of-court identification of Respondent was featured prominently at trial.

to Respondent's defense in this capital case.

Not only did Oubre make no attempt to impeach DeLouche with any information that unconflicted counsel would have explored with respect to improprieties that were documented in the sealed family law matters in which she represented DeLouche,[25] but deficiencies in her performance that stem from her conflict of interest cast a far wider net. For example, Oubre failed to question DeLouche about matters reflected in the supplemental police report he authored that were relevant to Respondent's argument that his inculpatory statements were involuntary and unreliable – and that demonstrated that DeLouche was perjuring himself in Respondent's case.[26] Likewise, Oubre never attempted to attack the thoroughness of the investigation that DeLouche had supervised, even though a significant amount of information undermines the theory of the case presented at trial.[27]

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[25] As the Lorenzi letter to Judge Godwin makes clear, it was well known among the defense bar in Lake Charles that DeLouche's family law record was sealed because of allegations of criminality made against him. Any reasonably competent attorney, accordingly, would have moved to unseal those records and would otherwise have undertaken an investigation of this critical state witness.

[26] For instance, Oubre did not question DeLouche about whether he and other investigators had honored Respondent's invocation of his right to counsel on August 27, 1998, even though the Supplemental Report authored by DeLouche establishes that immediately after Respondent invoked this right, DeLouche asked Respondent if he would nonetheless accompany investigators to the hotel where he had stayed when working in Lake Charles in 1996 and Respondent agreed to do so. R. 464. She did not question DeLouche about the fact that DeLouche and other investigators thereafter brought Respondent to the Confinement Center so that they could ask him questions if they needed to, R. 468, even though DeLouche testified that he and Task Force members had no contact with Respondent after he had invoked his right to counsel. R. (Vol. 25), at 57. She did not question DeLouche about the conditions under which Respondent was held in isolation, apparently at DeLouche's request, although solitary confinement clearly exerted a coercive effect on Respondent's weak psyche. R. 471. Similarly, Oubre did not question DeLouche about his apparent unsolicited contacts with Respondent at the prison after Oubre had been appointed to represent Respondent, which were reflected in the very writings that Oubre had brought to the trial court's attention at the beginning of the November 8 hearing which complained that DeLouche was constantly telling him to tell Oubre the truth. R. 967, 982.

[27] Oubre, for instance, did not challenge the reasonableness of the Task Force's conclusion that Virginia Johnson was the last person in the store and that the crime occurred immediately after she left, even though the statements of several witnesses described in DeLouche's Report and the owner's testimony at trial indicate that the store closed in normal fashion and that the employees were interrupted by their assailants while they were finishing up their tasks for the night. Oubre failed to bring out the fact that the Task Force had not cleared numerous other suspects with no known relationship to Respondent and did not attempt to

(continued...)

The patent deficiencies in Oubre's performance demonstrate that an actual conflict arose when Respondent's lead attorney was forced to cross-examine her other client. As discussed below, the State of Louisiana has not presented any compelling basis for this Court to review the lower court's analysis of the issue or its resolution of the case.

IV.
REASONS FOR DENYING THE STATE'S PETITION

The facts of this case would provide suitable material for anyone interested in penning a screenplay about provincial corruption, investigatory bungling and wrongful convictions. As discussed below, however, this case presents no compelling basis for review by this Court. The State's petition for writ of *certiorari* should accordingly be denied.

A. *This Court Lacks Jurisdiction Because the Louisiana Supreme Court's Extensive Reliance on Louisiana Law in Granting Relief Demonstrates that Its Decision Rests on an Independent and Adequate State Ground*

The State of Louisiana has invoked this Court's jurisdiction under 28 U.S.C.A. § 1257 on the ground that the Louisiana Supreme Court reversed Respondent's convictions and death sentences on the basis of the Sixth Amendment to the United States Supreme Court.[28]

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[27](...continued)
elicit from DeLouche that the Task Force was obviously desperate to solve the crime by the time Respondent was arrested. She failed to bring out the conflicts of interests inherent in the Task Force investigation, including the fact that DeLouche and other members of the Sheriff's Office were the individuals who personally investigated Richard McElveen, the son of their boss, and ruled him out as a suspect. Likewise, she did not bring out that the Sheriff and his office had been civilly sued by the families of the KK's Corner victims and stood to gain if Respondent were found guilty of the crime, since fault could then be apportioned to him.

[28] The State of Louisiana's jurisdictional statement is deficient. It fails to show "the date the judgment or order sought to be reviewed was entered" or "the date of any order respecting rehearing," as required by this Court's rules. Sup.Ct. Rule 14(e). As the Louisiana Supreme Court denied the State's timely filed application for rehearing on January 16, 2004, however, the State's petition before this Court is not barred as untimely.

The State of Louisiana has similarly failed to comply with this Court's rules elsewhere in its petition. The petition, for example, does not contain a "list of all parties to the proceeding in the court whose judgment is sought to be reviewed, as required by Rule 14(b); nor does it provide the "constitutional provisions . . . (continued...)

The lower court decision, however, rests on several Louisiana state court opinions that relied on both the Sixth Amendment *and* the Louisiana state constitutional corollary.[29] The latter provides in pertinent part:

> At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.

La. Const. art. I, § 13 (1974).[30]

The Louisiana Supreme Court's decision, moreover, relied on state law defining an attorney's professional obligations to her clients:

> This court has consistently held that a defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict. See, e.g., State v. Carmouche, 508 So.2d at 804; Franklin, 400 So.2d at 620 ("We must agree with the defendant's attorney, and with the trial judge, that an actual conflict arose when the state called [counsel's former client] to the stand. [Counsel] was put in the unenviable position of trying zealously to represent the defendant at trial while simultaneously trying to protect the confidences of a former client who was testifying for the state against the defendant."); see also Dane S. Ciolino, ed., Louisiana Rules of Professional Conduct, Rule 1.7 comment 3 (L.S.B.A.

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[28](...continued)
involved in the case, set out verbatim with appropriate citation," as required by Rule 14(f), or even cite to the Fourteenth Amendment to the United States Constitution.

[29] The Louisiana Supreme Court's decision below relied *inter alia* on State v. Franklin, 400 So.2d 616 (La. 1981), State v. Kirkpatrick, 443 So.2d 546 (La. 1983); State v. Kahey, 436 So.2d 475 (La. 1983); and State v. Carmouche, 508 So.2d 792 (La. 1987)(on rehearing). See Cisco, 861 So.2d 118, 129-130 (La. 2003)(Louisiana's Appendix A, at 22a-23a). The conflict analysis in all these state decisions rested on both the federal and state constitutions. Indeed, while the appeal in Carmouche was pending, the Louisiana Supreme Court had *sua sponte* remanded the case to the trial court to determine whether appellant's *state* constitutional right to counsel had been violated when defense counsel "represented both the defendant and an important prosecution witness who testified that the defendant confessed his guilt of the murder in this case while the two were incarcerated in the same cell block." State v. Carmouche, 480 So.2d 728, 729 (La. 1985).

[30] This language is certainly different from the right to counsel articulated in the federal constitution:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

2001) ("As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent.").

See Cisco, 861 So.2d at 130 (Louisiana's Appendix A, at 24a).

The lower court decision, accordingly, rests on an independent and adequate state ground, and jurisdiction accordingly does not lie in this Court. See Michigan v. Long, 463 U.S. 1032 (1983).

B. ***The Louisiana Supreme Court Correctly Found that Oubre's Joint Representation of Respondent and the Key Witness Against Him At Trial Created an Actual Conflict of Interest***

As it has throughout the appeal of this case, the State of Louisiana insists that Oubre's concurrent representation of Respondent and his principal accuser did not create even a hint of a conflict. The State's position is patently absurd. "Unlike the joint representation of codefendants, where there may be a benefit to presenting a united defense, in the case of dual representation of the defendant and an adverse witness, there is no benefit to common representation. To the contrary, the potential for less zealous representation of the defendant is obvious." State v. Watson, 620 N.W.2d 233, 239 (Iowa 2000). Cf. Holloway v. Arkansas, 435 U.S. 475, 482-83 (noting that in some cases, benefits may accrue from joint representation of co-defendants).

Indeed, this Court has recognized that an actual conflict of interest arises when a lawyer is forced to cross-examine one client on behalf of another. In Wheat v. United States, 486 U.S. 153 (1988), the Court held that the district court has authority to disqualify defense counsel, despite the defendant's waiver, when the likelihood of an actual conflict of interest is sufficiently high. The Court found that just such an unwaivable conflict would arise if a present or former client testifies on behalf of the government. As the Court observed "[t]he Government might readily have tied certain deliveries of marijuana by Bravo to petitioner, necessitating vigorous cross-examination of Bravo by petitioner's counsel. [Counsel], because of his prior representation of Bravo, would have

been unable ethically to provide that cross-examination." Id. at 164.[31] Indeed, the Louisiana Supreme Court found this Court's reasoning in Wheat entirely applicable to the facts of this case. As the lower court observed:

> In Wheat, much like in the instant case, the defendant sought representation by an attorney already representing potential prosecution witnesses. Id., 486 U.S. at 155-56, 108 S. Ct. at 1695. Unlike in the instant case, however, the district court in Wheat refused to allow potentially conflicted counsel to enroll. Id. 486U.S. at 157, 108 S. Ct. 1696. The Wheat court affirmed, rejecting arguments by the defendant that he should be permitted to waive any conflict. Id., 486 U.S. at 164, 108 S. Ct. at 1700.

Cisco, 681 So.2d at 132 n.20 (Louisiana's Appendix A at 29a, n.20).

Despite the soundness of this view, the State asserts, in conclusory fashion, that Oubre's representation of DeLouche was inconsequential and had no bearing on Respondent's defense on the grounds that (1) Oubre merely represented DeLouche in an innocuous and unrelated family court proceeding, and (2) DeLouche had absolutely no interest in the outcome of Respondent's criminal proceeding, since he was merely a third-party witness whose only interest was "in ensuring that justice was served." State's Brief, at 7. The State's arguments are disingenuous and misleading.

That Oubre's representation of DeLouche arose in an unrelated family law matter is legally irrelevant. "The fact that the simultaneous representation is on a civil matter makes no difference in the conflict of interest inquiry." Rosenwald v. United States, 898 F.2d 585, 588 (7th Cir. 1990). Rather, an attorney in Louisiana owes a duty of loyalty to her client regardless of the nature of the proceeding. See Rule 1.7 of the Louisiana Rules of Professional Conduct.[32] Thus,

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[31] Given the glaring nature of the conflict, the State has no one to blame but itself for the reversal of Respondent's convictions and death sentences, as it was well aware at the time of Oubre's appointment and throughout the proceedings that she also represented its key witness. Clearly, the State could (and should) have moved to disqualify Oubre prior to trial under Wheat.

[32] Indeed, lawyers practicing outside the State of Louisiana would face comparable professional strictures. See, e.g., Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 586-87 (1990) (continued...)

> [t]he problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney may have privileged information obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. . . . "The more difficult problem which may arise is the danger that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information."

Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980) (quoting United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975).[33]

Moreover, it is clear that the interests of Respondent and DeLouche could not have been more divergent. DeLouche spearheaded both the investigation of the KK's murder generally and the investigation that led to Respondent's arrest and prosecution. He was responsible for taking the bulk of Respondent's inculpatory statements – evidence that was the essential core of this prosecution.[34] In light of these facts, it is difficult to fathom how DeLouche would not have had a substantial

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[32](...continued)
(Kennedy, J., dissenting) (noting that "the lawyer's duty of loyalty long has precluded the representation of conflicting interests. See Williams v. Reed, 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me. 1824) (Story, J.); H. Drinker, Legal Ethics 103 (1953) (describing the ancient history of the prohibition on simultaneous representation). A lawyer, at least absent knowing waiver by the parties, could not represent both the respondents and the senior laidoff workers as the Union has done in this case. Cf. ABA Model Rules of Professional Conduct 1.7(b) (1984); ABA Model Code of Professional Responsibility DR 5-105(C) (1980).").

[33] See, e.g., Castillo v. Estelle, 504 F.2d 1243, 1245 (1974) (finding that counsel suffered a disabling conflict when he simultaneously represented a state witness in unrelated civil proceedings, a situation the court found to be "so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation essential to a fair trial."); Commonwealth v. Hodge, 434 N.E.2d 1246, 1248 (Mass. 1982)(conflict of interest arose where counsel's law partner represented police officer witness in unrelated libel suit; court noted that counsel "was operating under a genuine conflict of interest from the time it became clear that Patrick would give nontrivial testimony for the Commonwealth."); People v. Wandell, 554 N.E.2d 1274 (N.Y. 1990)("conflict existed by virtue of defense counsel's representation of the prosecution's chief witness" in unrelated civil matter).

[34] Virginia Johnson's dubious identification of Respondent certainly could not have served as the basis for prosecution in the absence of Respondent's inculpatory statements. All that she saw were two men in the store, who were doing nothing illegal, at some point prior to closing.

interest in the State's successful prosecution of the case.[35]

Furthermore, DeLouche had a more personal stake in the outcome of Respondent's prosecution. In July 1998, prior to Respondent's arrest, the victims' families brought civil suits against *inter alia* DeLouche's employer, the Calcasieu Parish Sheriff's Office. These were predicated, in part, on the failure of the Sheriff's Office to dispatch a deputy to investigate KK's Corner in response to the security company's request to put out a patrol, a call that was placed shortly after 1:00 a.m. on July 6, 1997. See R. 3196. The civil suits were pending at the time of Respondent's trial. It was in the interests of the Sheriff's Office both to place the crime as close to midnight as possible (thereby diminishing the chance that its negligent acts could be found to have caused the plaintiffs' injuries) *and* to convict Respondent, to whom the Sheriff's Office had attributed fault in its pleadings. See Supplemental and Amended Answer filed by Calcasieu Parish Sheriff and Calcasieu Parish Sheriff Deputy Jerome Lastrapes, in Guidry, et al. v. Kline, et al., 14th JDC No. 98-3862 (AA at 188-90).[36]

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[35] Cf., Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979) (finding that conflict of interest arising from defense counsel's simultaneous representation of prosecutor in unrelated civil proceedings was more troubling than one involving "a single prosecution witness[, as h]ere, the conflict could conceivably have infected the entire trial."). See also People v. Castro, 657 P.2d 932, 944-45 (Colo. 1983) (finding conflict of interest where counsel represented district attorney in separate proceedings and observing that, although counsel owed defendant zealous representation without regard to the effects on the district attorney, she also "owed her undivided loyalty to the district attorney as her client, and her professional responsibility in this respect implicitly included refraining from taking any legal action that might place him in public disfavor and further exacerbate the efforts of electors to oust him from office through a recall petition."); Pruitt v. State, 514 S.E.2d 639, 648 (Ga. 1999) ("The concurrent representation of a defendant in a capital case and the district attorney seeking the death penalty against the defendant is an obvious conflict."), cert. denied, 528 U.S. 1006 (1999). That DeLouche was the principal witness and the individual whose investigation fully informed the prosecution's case, rather than the lawyer who staged the trial, makes little difference to the analysis.

[36] Although DeLouche was no longer employed with the Sheriff's Office at the time of trial, he had been throughout the investigation and, at the time of trial, he (along with forty-one other deputies) was suing the Sheriff's Office in federal court to reinstate his position. See Complaint in Antoine, et al. v. Beth Lundy, Individually and in her Official Capacity as Calcasieu Parish Sheriff, U.S.D.C., W.D.La. No. CV00-1654-LC. (AA at 191-97).

Finally, in characterizing Oubre's representation of DeLouche as the provision of legal services in a mere family law matter, the State disregards the evidence Respondent produced on appeal (the substance of which was also provided to the trial court, but *not* Respondent) establishing that this was hardly a run-of-the-mill family law matter. Rather, Oubre represented DeLouche in child custody proceedings that raised such serious allegations of her client's criminal wrongdoing that the records in that case were sealed from public scrutiny.[37] These allegations were nonetheless known to the Calcasieu Parish criminal defense community, see Affidavit of Thomas L. Lorenzi (AA at 184-87), and accordingly would have been an obvious subject of investigation by defense counsel in Respondent's case. Due to Oubre's conflict of interest, however, they remained a subject that could not be broached.[38]

In light of the foregoing, it is remarkable that the State of Louisiana is now arguing before this Court that "this case is certainly not one of an overt and obvious conflict of interest," State's Brief, at 7, and that the Louisiana Supreme Court's conclusion that an actual conflict of interest arose from Oubre's joint representation of Respondent and a key State witness was an "egregious . . . assumption," State's Brief, at 11.[39]

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[37] Given the obviously contentious nature of the divorce and custody proceedings, it is astounding that the State has chosen to characterize Oubre's role in DeLouche' family court proceedings as "protect[ing DeLouche's] interests in the smooth and untroubled resolution of his marriage and of child custody . . . ." State's Brief, at 7.

[38] The State also urges that Oubre was the individual best suited to judge whether her joint representation of DeLouche and Respondent created a conflict of interest and that she was "amply protective of the respondent's Sixth Amendment rights." State's Brief at 14-15, 20. To the contrary, as this Court observed in Wheat: "Nor is it amiss to observe that the willingness of an attorney to obtain such [conflict] waivers from [her] clients may bear an inverse relation to the care with which [s]he conveys all the necessary information to them." 486 U.S. at 163.

[39] The State of Louisiana complains bitterly that the lower court's "most troublesome error," is that it "blatantly disregarded" this Court's decision in Mickens v. Taylor, 535 U.S. 162 (2002), by failing to conduct an analysis of whether Oubre's conflict adversely affected her performance as Respondent's attorney. State's Brief, at 20, 2. Clearly, however, the lower court considered this Court's decision in (continued...)

C. *The Louisiana Supreme Court Soundly Concluded that Respondent's Various Waivers of the Right to Conflict-Free Counsel Were Not Knowing and Intelligent*

Valid waivers of constitutional rights must be both voluntary and "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742 (1970). See Iowa v. Tovar, __ U.S. __, 204 U.S. LEXIS 1837 (2004). In this case, the Louisiana Supreme Court held that a knowing and intelligent waiver of the right to conflict-free counsel requires that a criminal defendant "be told (1) that a conflict of interest exists; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has a right to obtain other counsel." Cisco, 861 So.2d at 133 (Louisiana's Appendix A, at 29a) (citations omitted). Applying these factors, the lower court found that Respondent did not knowingly and intelligently waive his right to conflict-free counsel because he was given insufficient advice about the existence and consequences of his attorney's conflict of interest,[40] and he was never informed

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[39](...continued)
Mickens, as the case was addressed by both parties in their briefs. See Brief on Appeal, at 57, 58; State's Brief on Appeal, at 16 n.17; Reply Brief on Appeal, at 15, n.20. More importantly, the requirements of Mickens have been met, as the Louisiana Supreme Court specifically found that Oubre's performance *was* adversely affected because "a defense attorney required to cross-examine a current or former client on behalf of a current defendant *suffers from an actual conflict*." Cisco, 861 So.2d at 130 (Louisiana's Appendix A, at 24a). Indeed, this is precisely the same conclusion reached by this Court in Wheat, where it held that the trial court had properly exercised its authority in preventing such a conflict from contaminating the proceedings. That Oubre's performance as Respondent's counsel was adversely affected by her representation of his chief accuser is not a matter of mere speculation, but is amply borne out by the record of Oubre's cross-examinations of DeLouche. See *supra* at 18-20.

[40] As the court observed:

> At no time did counsel shed any light on the nature of her representation of either DeLouche or his wife other than to say that it was in "separate family law matters." The district court made no inquiry of counsel regarding the nature fo the matters in which she represented DeLouche and his wife. Nor did the district court ever inquire of counsel as to the substance of the Lorenzi letter. Moreover, although at the arraignment on October 13, 1998, the district court acknowledged that going "into a lengthy discourse with [the defendant] about what he understands about the conflict and putting more of that on the record . . . may be required under Wheat[,]" the court never engaged in such discourse with the defendant. Consequently, despite the fact that DeLouche's significant involvement in the defendant's case was readily apparent each time the defendant purportedly waived any conflict of

(continued...)

that he had the right to obtain other counsel. Id. at 133-34 (Louisiana's Appendix A, at 30a-32a).

The State has presented nothing other than bald assertions to counter the Louisiana Supreme Court's record-based conclusions. The State contends that Respondent "was fully informed of the nature of the potential conflict by defense counsel and two trial judges" State's Brief, at 16, and competently waived his right to conflict-free counsel, without providing any basis to conclude that Respondent knew what he was doing at the time he monosyllabically agreed to have Oubre remain as his attorney. See generally id. at 16-19. The State's self-serving statements cannot demonstrate any error in the Louisiana Supreme Court's analysis of this issue. Moreover, even assuming *arguendo* that trial court's and counsel's explanation of the nature and effect of the conflict were sufficient, the State has not pointed to any place in the record where Respondent was advised that he would be appointed another attorney if Oubre were removed on the basis of her conflict of interest.

The Louisiana Supreme Court's finding that Respondent's various waivers were neither knowing nor intelligent is fully supported by the record and applicable law, and provides no issue for this Court's review.

---

[40](...continued)
interest counsel Oubre had because of her dual representation of DeLouche and the defendant, neither Judge Godwin nor Judge Minaldi had taken appropriate steps to put themselves in a position to inform the defendant of the true nature of his counsel's conflict and any effects it could have on counsel's representation and her defense of his rights.

Cisco, 861 So.2d at 133-34 (Louisiana's Appendix A, at 31a-32a).

CONCLUSION

The Louisiana Supreme Court, after carefully considering the convoluted facts of this case, and state and federal jurisprudence governing the analysis of conflicts of interests, held that Respondent was entitled to a new trial at which he could be represented by an attorney who did not labor under divided loyalties fatal to a competent defense. The State of Louisiana has failed to set forth any compelling basis for this Court to review the Louisiana Supreme Court's decision. Accordingly, for the reasons set forth above, Respondent respectfully requests that this Court deny the State of Louisiana's petition for writ of *certiorari* to review the judgment of the Louisiana Supreme Court in this matter.

Respectfully submitted,

Marcia A. Widder
The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

Attorney for Respondent,
Thomas Frank Cisco

APPENDIX A

STATE OF LOUISIANA	*	14TH JUDICIAL DISTRICT COURT
VS. NO. 17646-98	*	PARISH OF CALCASIEU
THOMAS FRANK CISCO	*	STATE OF LOUISIANA
FILED: _____	*	_____ CLERK OF COURT

STATE'S MOTION AND ORDER FOR RECUSATION OF THE DISTRICT ATTORNEY'S OFFICE

NOW INTO COURT comes the State of Louisiana, through Rick Bryant, District Attorney, represented herein by the undersigned Assistant District Attorney, who, in support of this motion to recuse the Calcasieu Parish District Attorney's Office from the prosecution of this case presents the following reasons:

1.

The Louisiana Supreme Court reversed the defendant's murder convictions and death sentence and remanded this case for the appointment of new defense counsel and a new trial. (Exhibit A). The basis for the Court's decision was an actual conflict of interest which stemmed from defense counsel Evelyn Oubre's simultaneous representation of the defendant and prosecution witness Deputy Donald "Lucky" Delouche. Ms. Oubre represented the defendant in the capital case against him, and Deputy Delouche in an unrelated family law matter.

2.

Calcasieu Parish Assistant District Attorney Ric Oustalet currently represents Deputy Delouche in the same family law matters in which Ms. Oubre represented him at the time of the defendant's trial. (Exhibit B). The onset of this representation of Deputy Delouche preceded Mr. Oustalet's employment as an Assistant District Attorney. Neither Mr. Oustalet nor the District Attorney's Office believed this representation posed any conflict at the time Mr. Oustalet was hired. Indeed, the potential for a conflict of interest in this regard only arose when the Louisiana Supreme Court reversed the defendant's convictions and ordered a new trial, an unfortunate event the State did not foresee.

3.

Because of the Louisiana Supreme Court's decision in which it found a conflict of interest by Ms. Oubre's representation of Deputy Delouche on family law matters and the defendant in his criminal case, the State is concerned that a conflict of interest could be found by an Assistant District

Attorney's representation of State witness Deputy Delouche if the defendant is prosecuted by the Calcasieu Parish District Attorney's Office at another trial. Although this representation of Deputy Delouche by Mr. Oustalet does not involve the classic conflict of interest situation of joint representation. it certainly raises the potential for a conflict of interest. as well as various ethical issues.

4.

The State has filed a certiorari petition with the United States Supreme Court seeking reversal of the Louisiana Supreme Court's decision. This petition has been sent to the United States Supreme Court and defense counsel. However, for security and processing reasons it will not be through the screening process, and thus officially filed, for another few weeks. Since the time limitations for a new trial set forth in LSA-C.Cr.P. Art. 582 apply to this case, it is imperative that the State file this motion now to allow all parties adequate time to prepare for a second trial. The chances of the State's certiorari petition being granted are slim, and if the State is forced to retry this defendant then the ethical considerations denoted above are a legitimate cause for concern.

5.

To avoid even the appearance of impropriety and to save the victims' families and the taxpaying citizens of Louisiana from the prospect of some future appellate court awarding the defendant a third trial on the basis of Mr. Oustalet's representation of Deputy Delouche, the State herein moves for the recusal of the Calcasieu Parish District Attorney's Office under LSA-C.Cr.P. Arts. 680 et seq. The prosecution of this defendant and his second trial on murder charges should be handled by the Louisiana Attorney General's Office. Attorney General Charles Foti has been contacted by the District Attorney's Office and is aware of, and in agreement with, the State's motion.

WHEREFORE, the State respectfully requests that this Honorable Court grant this motion to recuse and assign the Attorney General's Office with the task of the criminal prosecution of this defendant.

Respectfully submitted,

RICK BRYANT
DISTRICT ATTORNEY
DAVID L. KIMBALL
ASSISTANT DISTRICT ATTORNEY
F. WAYNE FREY
ASSISTANT DISTRICT ATTORNEY

Carla S.

CARLA S. SIGLER
ASSISTANT DISTRICT ATTORNEY
1020 RYAN STREET
LAKE CHARLES, LA 70602

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been hand-delivered to Judge David A. Ritchie, and sent by certified mail to defendant's counsel of record, Marcia A. Widder, 636 Baronne Street, New Orleans, LA 70113 this 11th day of February, 2004.

Carla S.

CARLA S. SIGLER

STATE OF LOUISIANA	•	14TH JUDICIAL DISTRICT COURT
VS. NO. 17646-98	•	PARISH OF CALCASIEU
THOMAS FRANK CISCO	•	STATE OF LOUISIANA
FILED: _____	•	_____ CLERK OF COURT

ORDER

The State's motion to recuse is hereby granted. The Calcasieu Parish District Attorney's Office is recused and the Louisiana Attorney General's Office is assigned to the prosecution of this case.

THUS DONE AND SIGNED this _____ day of February, 2004 in Calcasieu Parish, Lake Charles, Louisiana.

_____
JUDGE DAVID A. RITCHIE

PLEASE SERVE:

Calcasieu Parish District Attorney's Office

Louisiana Attorney General's Office

Marcia A. Widder

STATE OF LOUISIANA

PARISH OF CALCASIEU

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, personally came and appeared **RICHARD C. OUSTALET, JR.**, a person of the full age of majority, who did swear or affirm under oath and state as follows:

That the affiant **RICHARD C. OUSTALET, JR.** is an attorney, licensed to practice law within the State of Louisiana;

That the affiant is an Assistant District Attorney for the 14th Judicial District Court, Parish of Calcasieu, State of Louisiana;

That prior to and since his employment with the aforementioned District Attorney's office, affiant has maintained a private law office located at 111 West Plaquemine Street, Jennings, Louisiana;

That since March of 2003, the affiant has been and continues to be the legal representative and attorney of record for Donald "Lucky" DeLouche in various civil matters in both the 14th Judicial District Court and the 31st Judicial District Court;

That as a result of this representation, affiant may have information which would be protected under the attorney-client privilege which may or may not be relevant to criminal proceedings in which Donald "Lucky" DeLouche is a key witness for the State of Louisiana;

SWORN TO AND SUBSCRIBED before me, Notary Public, in the presence of the undersigned witnesses at Lake Charles, Louisiana this 20th day of January, 2004.

WITNESSES:

RICHARD C. OUSTALET, JR.

NOTARY PUBLIC

EXHIBIT

B

APPENDIX B

STATE OF LOUISIANA	*	14TH JUDICIAL DISTRICT COURT
VS. NO. 17646-98	*	PARISH OF CALCASIEU
THOMAS FRANK CISCO	*	STATE OF LOUISIANA
FILED: 2-11-04	*	Vicki P. Shaver CLERK OF COURT

ORDER

The State's motion to recuse is hereby granted. The Calcasieu Parish District Attorney's Office is recused and the Louisiana Attorney General's Office is assigned to the prosecution of this case.

THUS DONE AND SIGNED this 11th day of February, 2004 in Calcasieu Parish, Lake Charles, Louisiana.

JUDGE DAVID A. RITCHIE

PLEASE SERVE:

Calcasieu Parish District Attorney's Office
1020 Ryan Street
Lake Charles, LA. 70602

Louisiana Attorney General's Office
Attn: Julie Cullen
Livingston Building
1885 North Third Street
Baton Rouge, LA. 70802

Marcia A. Widder
636 Baronne Street
New Orleans, LA. 70113

Exhibit 'B'

APPENDIX C

RICK BRYANT
District Attorney
FOURTEENTH JUDICIAL DISTRICT
CALCASIEU PARISH

RONALD A. ROSSITTO
FIRST ASSISTANT
DISTRICT ATTORNEY

1020 RYAN
P.O. BOX 3206
LAKE CHARLES, LA. 70602
PHONE (337) 437-3400
FAX (337) 437-3325

March 1, 2004

Marcia A. Widder
The Capital Appeals Project
636 Baronne Street
New Orleans, Louisiana, 70113-1004

Re: State of Louisiana
v.
Thomas Frank Cisco
United States Supreme Court No. 03-1153

Dear Marcia:

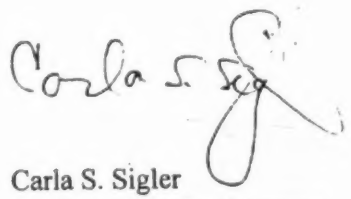
On February 9, 2004, the Calcasieu Parish District Attorney's Office filed a petition for writ of certiorari on behalf of the State of Louisiana with the United States Supreme Court. On February 11, 2004, the Calcasieu Parish District Attorney's Office filed the *State's Motion and Order for Recusation of the District Attorney's Office* with the trial court. The trial court granted the State's motion on February 11, 2004. On February 19, 2004, the Louisiana Department of Justice sent a letter to the Calcasieu Parish Clerk of Court stating that the Calcasieu Parish District Attorney's Office has been recused "from any investigation or prosecution" of the case. A copy of this letter is enclosed.

To clarify any confusion, the Calcasieu Parish District Attorney's Office filed the above referenced motion in order to recuse itself from *State of Louisiana v. Thomas Frank Cisco*. LSA-C.Cr.P. Arts.680 et seq. of the Louisiana Code of Criminal Procedure deal with recusal, and it is evident from these articles that when a District Attorney is recused from a case he is removed from the entirety of proceedings in that case. That was the intention of the Calcasieu Parish District Attorney's Office when it filed the recusal motion, and it is undoubtedly the legal effect of such a motion being granted.

In response to your letter, and out of an abundance of caution, I contacted the United States Supreme Court Clerk's Office. The United States Supreme Court Clerk's Office assured me that, as I had believed to be true, no formal papers or motion needs to be filed by this office in order to withdraw as counsel of record from the case. Rather, a letter notifying the Court of new counsel

would be sufficient. A copy of this letter is enclosed for your convenience.

Sincerely,



Carla S. Sigler
Assistant District Attorney

CS/sb

File

CHARLES C. FOTI, JR.
ATTORNEY GENERAL

State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE
70804-9005

February 19, 2004

Honorable James R. Andrus
Calcasieu Parish Clerk of Court
Post Office Box 1030
Lake Charles, LA. 70602

DVC-04-02-147

RE: State of Louisiana v. Thomas Frank Cisco
Charge: 17646-98

Dear Mr. Andrus:

Pursuant to Article 680 et seq. of the Louisiana Code of Criminal Procedure, Rick Bryant, District Attorney, Fourteenth Judicial District, Parish of Calcasieu, has been recused from any investigation or prosecution of the above captioned case and the case has been certified to me for appointment of a District Attorney Ad Hoc.

By virtue of the authority granted this office by Article 682 (as amended by Act 652 Regular Session 1972 Legislature), of the Code of Criminal Procedure, I, hereby accept the appointment of the court as District Attorney Ad Hoc in the above captioned matter. The Assistant Attorneys General assigned to the Criminal Division will function in the same manner as Assistant District Attorneys. This communication is your authority to enroll the Criminal Division of the Attorney General's Office as prosecutor of record in the captioned case. Julie Cullen, of my staff, will act as lead counsel in this case and will be your contact person with this office.

Additionally, please note that C.Cr.P. art. 683.1 authorizes reimbursement to the District Attorney Ad Hoc for the expenses incurred in the prosecution of recusal matters.

With kind personal regards, I am,

Sincerely,

CHARLES C. FOTI, JR.
Attorney General

BY: Sheila M Dyson

SHEILA M. DYSON
Administrative Assistant
Criminal Program
Louisiana Department of Justice

CCF/smd
cc: Honorable Rick Bryant

RICK BRYANT
District Attorney
FOURTEENTH JUDICIAL DISTRICT
CALCASIEU PARISH

RONALD A. ROSSITTO
FIRST ASSISTANT
DISTRICT ATTORNEY

1020 RYAN
P.O. BOX 3206
LAKE CHARLES, LA. 70602
PHONE (337) 437-3400
FAX (337) 437-3325

March 1, 2004

Honorable William K. Suter
Supreme Court of the United States
Office of the Clerk
Washington D.C. 20543-0001

Re: **State of Louisiana**
v.
Thomas Frank Cisco
Docket No. 03-1153

Dear Mr. Suter:

On February 9, 2004, the Calcasieu Parish District Attorney's Office filed a petition for writ of certiorari on behalf of the State of Louisiana with the Supreme Court. On February 11, 2004, the Calcasieu Parish District Attorney's Office filed a *State's Motion and Order for Recusation of the District Attorney's Office* with the trial court. The trial court granted the State's motion on February 11, 2004. On February 19, 2004, the Louisiana Department of Justice sent a letter to the Calcasieu Parish Clerk of Court confirming that the Calcasieu Parish District Attorney's Office has been recused "from any investigation or prosecution" of the case. A copy of this letter is enclosed.

The Calcasieu Parish District Attorney's Office has been recused from all stages of this case, including any proceedings before the Supreme Court. The Louisiana Attorney General's Office is now counsel of record for the State in *State of Louisiana v. Thomas Frank Cisco*. Please substitute the Louisiana Attorney General's Office as listed counsel of record for the State of Louisiana in any proceedings before the Supreme Court in this case. Therefore, please direct all future correspondence to Ms. Julie Cullen at the Louisiana Attorney General's Office, as she will serve as lead counsel for the State. Her address is provided below:

Ms. Julie Cullen
P.O. Box 94005
Baton Rouge, Louisiana, 70804-9005
Tel. # (225) 326-6200

Sincerely,

Carla S. Sigler
Assistant District Attorney - Appellate Section

CS/sjb

APPENDIX D

COPY SUPPLEMENTAL RECORD COPY

No. _____

DUPLICATE B

SUPREME COURT
STATE OF LOUISIANA

01 KA 2732

Volume No. I of I

Filed _____ 19___

_____
Clerk

STATE OF LOUISIANA

Plaintiff and APPELLEE

VERSUS

Thomas J. Cisco

Defendant and APPELLATE

APPEAL FROM

The 14TH Judicial District Court for the

Parish of CALCASIEU

No. RC 1954-98 HON. P. Minaldi
Judge

2002 OCT -7 A 11:04
SUPREME COURT
LOUISIANA
CLERK OF COURT

ASST. D.A., WAYNE FREY
1020 RYAN ST., LAKE CHARLES, LA 70601 Counsel for STATE

MS. EVELYN OUBRE Counsel for DEFENDANT
522 CLARENCE ST., LAKE CHARLES, LA 70601.

COPY SUPPLEMENTAL RECORD COPY

IN THE FOURTEENTH JUDICIAL DISTRICT COURT

IN AND FOR THE PARISH OF CALCASIEU

STATE OF LOUISIANA

STATE OF LOUISIANA	:	
VERSUS	:	RC1954-98
THOMAS F. CISCO, JR.	:	

- - - - - - - - - - - - - - - - -

Evidence adduced and proceedings had in the above numbered and entitled matter on September 24, 1998, at 9:30 o'clock, a.m, before the Honorable Fred R. Godwin, Judge of the Fourteenth Judicial District Court in and for the Parish of Calcasieu, State of Louisiana.

APPEARANCES:

Mr. F. Wayne Frey
Assistant District Attorney
Lake Charles, LA

Counsel for the State

Ms. Evelyn Oubre
Attorney at Law
Lake Charles, LA

Mr. John LaVern
Public Defenders' Office
Lake Charles, LA

Counsel for the Defendant

Defendant present in Court

Also Present: Mr. Clive Stafford-Smith

ELIZABETH H. SURLES
OFFICIAL COURT REPORTER
P. O. Box 3210, Lake Charles, LA 70602
Phone (337) or 437-3530 Ext. 144

COPY

THE COURT:

All right. All right, Ms. Oubre, are you ready to proceed?

MS. OUBRE:

One moment, Your Honor, please, sir. May I have a private moment with my client, sir?

THE COURT:

Yeah.

[At this stage of the proceedings, other unrelated matters were taken up.]

THE COURT:

We're ready to proceed on the --

MS. OUBRE:

Prior to going into the motion for samples, a problem -- potential problem has arisen, and the fact that I have been appointed as lead counsel for Mr. Cisco. The Violent Crimes Task Force was the agency that investigated the case. The chief of that office is Mr. Lucky DeLouche, whom I represent in family court matters, as well as his wife. Also on the Violent Crimes Task Force is Mr. Victor Salvador, who I also represent in family court matters. I have explained this to Mr. Cisco, I have explained it to Mr. DeLouche and Mr. Salvador. I have prepared a written document for Mr. Cisco to sign. He has signed it. I have gone back over it with him again this morning, explained to him the potential conflict,

although I do not see one, and according to the Code of Professional Conduct, I do not see one, I want to be absolutely cautious and I want to do what Mr. Cisco requests of me. And it is my understanding as of still this morning Mr. Cisco desires that I remain as his lead counsel.

THE COURT:

All right. Let me read what's been signed here.

MS. OUBRE:

And I have provided a copy of that to Mr. Frey, sir.

MR. FREY:

I acknowledge receipt, Your Honor.

[Court reading documents]

MS. OUBRE:

Mr. Cisco, would you stand up, the Court's going to address you, sir.

THE COURT:

Yeah, Mr. Cisco, come up to the microphone here with your attorney.

[Does so]

THE COURT:

I've been handed this letter that Ms. Oubre wrote, the original letter Ms. Oubre wrote to you.

MR. CISCO:

Yes, sir.

THE COURT:

And it shows here that you've signed

ELIZABETH H. SURLES
OFFICIAL COURT REPORTER
P. O. Box 3210, Lake Charles, LA 70602
Phone (337) or 437-3530 Ext. 144

it. I'll show it back to you there, and do you -- you signed it there on that paragraph, --

MR. CISCO:

Yes, sir.

THE COURT:

-- right here, that's your signature? We need to say it in the microphone. This letter of September 16th, 1998 to you shows your signature on it; and you did sign that?

MR. CISCO:

Yes, sir.

THE COURT:

And you read the letter?

MR. CISCO:

Yes, sir.

THE COURT:

Okay. You understood it?

MR. CISCO:

Yes, sir.

THE COURT:

Let me just point out. I can't sit here and think of a lot of different ways that some conflict can come up, but let me just give you one that comes to mind, and let you be sure you see what we're talking about here. For example, let's suppose that Mr. DeLouche ends up being a witness for the State against you, giving testimony that's harmful to your case. Ms. Oubre is obligated to cross examine

him and try to bring out whatever she can bring out that's helpful to your case.

MR. FREY:

Your Honor, if I could, just to make things perfectly clear, Deputy DeLouche will be a witness in this case against Mr. Cisco.

THE COURT:

Well, okay, it -- well, you've heard that said now, that he will be a witness. All right. There is the -- there is at least the potential, or the concern, for example, that you may at some point have some feeling that Ms. Oubre, because she represents Mr. DeLouche personally, isn't being as aggressive as you think she ought to be, or isn't pushing him as much as you think she ought -- I don't know, I'm just -- that's just one little way it could come up that would -- that's what we call conflict.

MR. CISCO:

Right.

THE COURT:

As to whether -- as to whether there's any concern that her duty to you to be -- fully assert all your rights is going to be held back in any way because of any relationship or duty -- client relationship she has with DeLouche. And the same goes for Mr. Salvador. And I can't sit here and forecast all the

different little ways that something may come up there, but that's what we're talking about, is something like that. This letter that's written here uses the term conflict and everything, and I'm trying to flesh it out for you, for you to picture -- so, do you see all of that?

MR. CISCO:

Yes, sir, I understand.

THE COURT:

And you're comfortable with that?

MR. CISCO:

Yes, sir.

THE COURT:

And you want Ms. Oubre to continue representing you?

MR. CISCO:

Yes, I do.

THE COURT:

And you're -- you then are waiving any complaint or problem that you would otherwise have about conflict because she's representing you, but happens to also - long before she ever was appointed to represent you - represented Mr. DeLouche in a personal matter.

MR. CISCO:

Yes, I am.

THE COURT:

And that's not a problem for you?

MR. CISCO:

No.

THE COURT:

Okay. Well, I'm satisfied -- what's your -- well, let me get this much, too. What's your education?

MR. CISCO:

I quit in the 11th grade.

THE COURT:

Okay. What kind of work have you done?

MR. CISCO:

I've done anywhere from roofing to building house and ceramic tile.

THE COURT:

Well, you certainly sound sufficiently articulate and able to understand -- you understand everything I've said here.

MR. CISCO:

Yes, sir.

THE COURT:

Yeah. Okay. Well, I'm satisfied that the matter can proceed and that whatever conflict that might be can be and has been waived, and I'm going to file the letter in the record.

MR. FREY:

We'll call Deputy DeLouche to the stand, Your Honor.

DONALD DELOUCHE,

after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION